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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MORENO L. KEPLINGER and JAMES B. PLANK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. 84-1639

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORENO L. KEPLINGER, PAUL L. WRIGHT, and JAMES B. PLANK,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 CR 235—**John A. Nordberg,** *Judge.*

ARGUED APRIL 25, 1985—DECIDED OCTOBER 29, 1985

Before CUMMINGS, *Chief Judge,* CUDAHY, *Circuit Judge,* and GRAY, *Senior District Judge.**

CUDAHY, *Circuit Judge.* This criminal litigation involves laboratory studies, using rats as subjects, undertaken to determine the safety of certain products for human use. Alleged falsification of data and irregular procedures created doubts about the validity of the reported study conclusions. After a trial that lasted six months and produced more than 17,000 pages of transcript, several defendants associated with the laboratory were convicted

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* The Honorable William P. Gray, Senior District Judge for the Central District of California, is sitting by designation.

of various counts of mail fraud, wire fraud and making false statements, although there were also acquittals on some of the counts charged. Over-length briefs totaling more than 500 pages were then added to this already voluminous mass of record material.[1] The defendants appeal, claiming insufficiency of the evidence, and a multitude of trial errors. We affirm.

Industrial Bio-Test Laboratories, Inc. ("IBT") is a contract research laboratory which conducts animal toxicity studies of various drugs, pesticides and chemicals for manufacturers in order to determine their safety and effectiveness. Defendant Moreno Keplinger was IBT's Manager of Toxicology. Paul Wright was Section Head of Rat and Dog Toxicology at IBT until October 1972, at which time he left IBT to become Manager of Toxicology for Monsanto Corporation and served as liaison to IBT. James Plank served as IBT's Group Leader of the Rat and Dog Toxicology Department and was later Assistant to Keplinger.

The defendants here were convicted of various counts involving fraud and false statements in connection with two studies run by IBT.[2] The first animal toxicity study was performed for Monsanto Corporation ("Monsanto")

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[1] This is admittedly a complex case, but not nearly so complex as defendants would make it seem. Each "brief" (an ironic term) was far longer than necessary to make its points effectively. Apart from the burden imposed on the court, *see United States v. Devine*, No. 84-3183 (7th Cir., July 25, 1985), such excess verbiage does nothing to aid a party's case. To the contrary, it is far more likely that meritorious arguments will be lost amid the mass of detail. We have painstakingly reviewed each party's arguments, although, by necessity, we have omitted mention of many of the less important facts and contentions from this opinion.

[2] Counts I, V, VI, and VII relate to the TCC study. Counts III and VIII relate to the Naprosyn study. Keplinger was found guilty on Counts I, V, VI, VII, III, and VIII. Wright was found guilty on Counts I, V. Plank was found guilty on Counts I, VI, VII, III, and VIII. Charges were also brought in connection with a third study, but all defendants were acquitted on these counts.

and concerned Trichlorocarbanilide ("TCC"), an ingredient in deodorant soaps. Defendants participated in preparing three allegedly fraudulent written documents, which came out of this research: (1) a final study report submitted by IBT to Monsanto and then by Monsanto to the FDA; (2) a written explanation to the FDA from IBT answering questions about the TCC final report; (3) and an early version (the first draft) of the final report, which was submitted to Monsanto with an explanation of the TCC study. The alleged fraud involved suppression of relevant information or falsification of data in the following categories: a) underreported mortality of research animals and commingling of original and later-started research animals; b) omission of histopathological data on research animals; c) omission of data on post-mortem examination of animals; d) failure to report the original opinion of a Dr. Gordon that TCC had a significant effect on research animals at the lowest dose level; e) failure to disclose a pathology report by a Dr. Ribelin with respect to the effect of TCC on the epididymis of research animals.

The second study involving allegations of mail fraud was performed by IBT on Naprosyn, an anti-inflammatory drug used in the treatment of arthritis. The alleged fraud here involved a report sent to Syntex Corporation ("Syntex") including blood and urine data and an Appendix II relating to gross pathology. The blood and urine data was allegedly wholly fabricated and Appendix II was allegedly falsified. A written explanation of the Naprosyn report submitted to the FDA also allegedly contained false statements.

I. Sufficiency of the Evidence

In reviewing a conviction, "the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (footnote omitted) (emphasis in original). Therefore, the decision facing this court is "whether, after viewing the evi-

dence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in original). Only when the record contains no evidence, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt may an appellate court overturn a verdict. *E.g., United States v. Brown*, 739 F.2d 1136, 1149 (7th Cir.), *cert. denied*, 105 S. Ct. 331 (1984). In applying this standard, the court must leave to the jury the weighing of the evidence, the drawing of reasonable inferences and determinations of credibility.

A. *Trichlorocarbanilide (TCC)*

We first examine the issue of underreporting of rat mortality in the TCC study. Accurate mortality data is important because it provides evidence of a substance's impact on test animals and also because it can provide evidence of environmental problems which might compromise the validity of a study. Apparently, the TCC study was plagued from the outset by a high death rate, which, the government contended, defendants attempted to conceal.

The government's proof that the mortality rate was falsified included evidence that the first draft of the TCC report and the version eventually forwarded to the FDA reported different mortality data for the same period of time. Another IBT document, an interim status report, contained still another set of mortality data for the same time period. The mortality shown in all of the documents made the subject of the charges in the indictment is lower than that shown in internal IBT documents from which mortality can be calculated. Further, laboratory technician Smith testified that during the first six months of the TCC study, he specifically observed animal deaths which were not accurately recorded. Laboratory technician Penner also testified that he observed deaths which were not reported during the same time period. Particularly when buttressed with contradictions in other data, these facts provide sufficient basis for the jury to find that the mortality data was false.

The defendants argue that these facts do not provide adequate proof of fraud and that the government must prove the true rate of animal mortality in order to establish that the mortality figures in the TCC final report are false. Defendants argue that there was no testimony which established that the data "substantially underreported" mortality. They contend that the testimony of technicians Smith and Penner did not specifically tie the mortality rate in the problematic animal watering room (the "AWR") to the TCC study and that the witnesses' recollections of deaths were speculative. Defendants attempt to discount the contradictions in the data reported in the first draft, an interim status report and the version supplied to the FDA by focusing on the mortality rate over the entire course of the study, suggesting that there was no substantial intentional underreporting.

The government contends that it does not have to prove the true rate of mortality, but rather only that the reported mortality rate was too low and the defendants' reports must have been false. Holdings in similar cases support the government's position that there is no need to show the "true" figures. *See, e.g., Coil v. United States*, 343 F.2d 573, 576 (8th Cir.), *cert. denied*, 382 U.S. 821 (1965). And defendants cite no authority for their proposition that the government must prove the real rate of mortality. The very nature of the allegations suggests the inherent impossibility of showing the "true" rate of mortality, since the accurate underlying data was never recorded. Smith and Penner, who worked on the TCC study, testified that they observed more deaths than were listed in the reports. In challenging the testimony given by Smith and Penner by characterizing it as recollection, impression and speculation, defendants attempt to reweigh credibility determinations that were properly left to the jury. We think that these technicians' testimony supports the inference that the mortality data supplied by the defendants was falsified, even if these witnesses cannot establish the true mortality rate. If totals for some periods were false (6 and 12 month status reports showing no

deaths), then the tables including this data are necessarily false, at least in part. At the conclusion of the TCC study, the report included mortality data that was different from the 6 and 12 month status reports. The final report, submitted to the FDA, had still another set of mortality data. All three of these sets of data substantially underreported mortality. This evidence adequately supports a jury determination that the mortality data supplied by the defendants were false.

The high mortality of rats in the TCC study presented concerns going beyond the alleged underreporting of mortality data, however. If an insufficient number of rats survived to the end of the study, IBT would be unable to make any valid evaluation of the safety of the tested substances. Given the unusually high mortality rate, the government charged, defendants therefore chose to commingle with existing research animals new animals which had not been fed the test material for as long a period as the original animals. This obviously is not an acceptable procedure, for it compromises the validity of a study.

In the instant case, adding together the number of animals that were sacrificed during the study and the number of animals that died while the study was in progress produced a total of more animals than there were at the start of the study, thereby implying that commingling occurred. Defendants' subsequent knowledge of that commingling was established by both direct and circumstantial evidence, and the commingling was concealed from the FDA. Intent to defraud may be inferred from the totality of the circumstances surrounding the actions of the defendants. *E.g., United States v. Brown*, 739 F.2d at 1149.

The government proved four incidents of commingling in two ways: 1) through the accumulated testimony about the acts of individual lab technicians, and 2) by a documentary review of the number of animals used in the study. The first incident of commingling was established by technician Garrett who testified that early in the study he filled up empty cages with fresh rats. Defendants

assert that this early instance of commingling of "control" rats was not significant since the indictment focuses on the alleged commingling of late-started research animals. But this argument overlooks the fact that the control commingling alone establishes the falsity of assertions in the final report about the length of time animals were on the study. Additionally, this first incident, specifically ordered by defendant Plank, establishes his knowledge that at least some commingling was occurring and evidences a scheme to respond to high mortality by commingling new animals. Further, this early commingling rebuts defendants' claims that technicians later in the study could have distinguished still newer animals from purportedly older ones already in the cages.

A second incident of commingling took place about March 1972 when technician Penner added new animals to the gang cages. Subsequently, other technicians under the direction of technician Thompson placed some of those animals into the individual cages to fill vacancies caused by deaths. No starting study dates were entered on the relevant cage cards, a fact which partially accounts for the fact that the technicians seemed to have been unaware of the commingling. In August 1972 Thompson observed the addition of more animals to the study. The starting dates were in this case marked on the cage cards of this group of research rats. Records of animals on the study about March 1972 also established that Garrett commingled the animals and other technicians commingled animals added by Penner.

A third instance of commingling involved the necropsy log and blood data, which were used by pathologists and toxicologists to draw conclusions about the effect of TCC. Among other things, after August 1972 Thompson sent dead animals to the laboratory for analysis without distinguishing between animals that started in August and those that had started earlier.

The fourth instance of commingling involved the final sacrifice when all the animals were killed. For the study to have validity, a required number of male and female

rats in each study group had to be available for examination at the end of the study. As it turned out, precisely the right number of male rats were available in each group. Either this was a remarkable coincidence or late-started animals were added to the group cages when necessary to provide the requisite number of males. The third and fourth cited instances of commingling suggest that the data from animals started in August 1972 found its way into the final version of the TCC report submitted in 1976 by IBT to Monsanto. The commingling evidence is sufficient to support the jury's determination that the TCC final report was false.

Defendants challenge the validity of the commingling evidence by noting that each of the technicians denied intentional commingling. They dismiss Garrett's testimony about the first instance of commingling as irrelevant to the alleged commingling of late-started animals. Additionally, by attempting to characterize Garrett's testimony as uncorroborated, defendants essentially argue that the jury's credibility determinations may be reweighed. Of course, this is incorrect. *See United States v. Grabiec*, 563 F.2d 313, 316 (7th Cir. 1977). The mere fact that technician Thompson, for example, did not know that "control" animals were being commingled does not preclude his having played an unwitting role in the process.

Defendants also argue that the technicians would have easily identified late-started animals because those animals would have been younger and smaller. But, as noted, this is an inaccurate assumption since Plank was attempting to obtain older and more mature rats and Garrett had introduced new animals into the study before Penner. That the technicians' commingling was inadvertent appears from their own testimony and from the omission of starting dates on cage cards.

Dr. Lijinsky (an animal testing expert) analyzed documents from the study and concluded that commingling had occurred, because the total number of animals sacrificed during the study and those that died while the study was in progress exceeded the number that originally started.

This evaluation was based on an interpretation of notations in the animal weight books (for example, interpreting dashes as meaning deaths) which was supported by the technicians' testimony that when an animal died a dash appeared where its weight would ordinarily be entered. The defendants attack Dr. Lijinsky's findings on various bases, including the fact that he placed the great bulk of the deaths and replacements in the first eight months of the study where their significance was diminished. Defendants also claim that there were errors in weighing and substitution procedures, and that Dr. Lijinsky misinterpreted the significance of various notations. But the evidence suggests that, if anything, Dr. Lijinsky underestimated deaths. For example, in at least one treatment group, the number of animals used exceeded the number of animals that started the study by 30%. We think the evidence of commingling is more than sufficient.

Further, the evidence showed that, when commingling was discovered, it was brought to the defendants' attention before they made their reports and submissions. IBT employees Smith, Garrett and Reyna, who worked on the TCC study, knew about the excessive mortality rate and discussed the bad AWR conditions causing that problem with Plank and Wright, which at least implied that these defendants knew they had a potentially serious problem threatening the validity of the study. Further, there is testimony that Plank explicity directed Garrett to commingle late-started animals. In addition, Keplinger and Wright made the decision to begin a late-started group of animals. All three defendants attended a February 1975 meeting that revealed, if they did not know it before, that commingling had occurred. At another meeting in December 1976, commingling was again confirmed through inconsistencies shown to Keplinger and Plank in the numbering systems that Phil Smith had used to record animal data. Defendants also knew that the study data included histopathology from commingled animals. The data presented in the 1976 version of the final report was asserted to have come from animals that had been on the study for

the full 24 months. Keplinger was well aware of the falsity of this statement. Knowledge of this falsity alone is sufficient. *See United States v. Outpost Development Company*, 552 F.2d 868, 869-70 (9th Cir.), *cert. denied*, 434 U.S. 965 (1977).

The next issue of concern is the misstatement of Dr. Gordon's conclusions. Dr. Gordon was responsible for microscopic examination of tissues from the study animals to determine whether ingestion of TCC had any toxic effects at certain dosage levels including the lowest ("T-1").[3] This examination initially focused on the organ that toxicologists believed would be affected first, in this case the testis.

Gordon conducted histopathological examinations (by microscope) of tissues taken from animals sacrificed at the end of the study and of those from treatment group animals, as well as control animals, that died earlier. Based on these examinations, Gordon concluded that there were treatment-related changes (which he called degeneration) at all three levels of dosage (including T-1) while there was little testicular degeneration in the control animals. According to Dr. Gordon, TCC damaged the testis and T-1 was an "effect level." The defendants for obvious reasons resisted these conclusions. They directed Gordon to examine more slides; but in order to do so, he had to look at tissues from late-started animals because there were no more rats available from the original study. Examination of these late-started animals supported his original conclusion that T-1 was an effect level.

Still dissatisfied with these results, Wright sent selected slides, omitting post-mortem and late-started animals, to Dr. Ribelin, an independent consultant. After reviewing

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[3] The analysis of toxic effects focused on a search for a "no-effect" level: a dosage level at which animals receiving the substance showed no toxic effects when compared with control animals that did not receive the substance at all. If a no-effect level for animals is identified, it can be used to determine a safe level for human use.

the slides, Ribelin also found that a no-effect level had not been reached and that there were treatment-related effects from TCC. Ribelin, however, discovered degeneration in the epididymis, the excretory duct of the testes, and not in the testes themselves. Defendants presented a great deal of evidence to show that the testes and the epididymis are different and that since the testes were the target organs of the study, a finding of an effect level in the epididymis did not support a conclusion that T-1 was an effect level for the testes. But the jury was entitled to accept the government's alternative view that if treatment-related effects were found in any part of the rat, a safe level of dosage had not been established, and so Ribelin's conclusion was not consistent with the position that T-1 was a safe level for TCC. The jury was entitled to find that the defendants' suppression of this report denied the FDA important information about the safety of TCC.[4]

Despite the evidence that both Gordon and Ribelin believed T-1 to be an effect level (although they perceived different types of effects), the defendants argue that these researchers agreed that T-1 was a no-effect level. The government contends that Gordon was pressured into approving a change in his opinion, exonerating TCC, but the defendants argue this change was voluntary. The jury decided this question, and we will not reconsider it.

The government also contends there was fraud in the revisions made in the final report to the FDA. That report stated that post-mortem autolysis (deterioration of tissue after death) precluded meaningful evaluation of the testes of animals that died during the study. Yet defendants do not deny that Gordon was in fact able to examine these animals, did so, and made histopathologic findings regarding these animals. Those findings were omitted from the

[4] Defendants also argue that their failure to disclose the Ribelin report could not constitute fraud, a contention we discuss in Part III of this opinion.

report, implying that the animals were not examined at all. There was testimony that Keplinger told Wright that there were animals available for post-mortem evaulation but Wright edited the final report to indicate that decay made such animals unavailable. Although defendants offered testimony that there was a valid reason for omitting the data, the jury could reasonably have concluded instead that Gordon's findings were omitted because they were adverse to the conclusions defendants wanted to draw. Additionally, the government presented evidence to show that data collected from gross pathology examinations (opening the animals and examining tissue without a microscope) was changed so that the T-1 level would appear to be a no-effect level. Earlier versions of the report, however, indicated that there were treatment-related effects at all three dosage levels. Whether the omitted histopathology and post-mortem data could have affected the FDA's decision about the safety of TCC was a judgment properly left to the jury.

The government showed that the final 1976 report was backdated by two years to 1974. The defendants argue that this was done to avoid confusion and consolidate all the results, but the government contends that the purpose was to conceal all the conflicts in the interim reports, to mask the falsifications in the data and to cover up the important omissions. Once again defendants' arguments indicate only that they presented evidence disputing the government's interpretation of various events; they do not persuade us that the jury could not reasonably accept that interpretation.

There are, of course, numerous other aspects of the TCC evidence which might be discussed if time or space permitted, but we believe we have pointed to sufficient evidence from which a jury could find a scheme to defraud. Defendants' arguments essentially seek a reweighing of the evidence, which the jury found, and which we conclude was sufficient, to establish materially false statements and omissions in the study reports beyond a reasonable doubt.

B. *Naprosyn*

The second study examined the long-term toxicity effects of Naprosyn, a drug used for the treatment of arthritis. That study was conducted by IBT for Syntex in 1971 and 1972. The government identified two problem areas in the reports from that study: 1) alleged fabrication of blood and urine data, and 2) alleged fabrication of much of the gross pathology data appearing in Appendix II of the report.

In testing the evidence to determine its sufficiency, we focus first on the blood and urine data reported, which the government charged was never actually collected. The government presented evidence that the study was extended beyond 18 months, and as a result of the final sacrifice was postponed and the blood and urine tests scheduled to occur just before the sacrifice were canceled and never thereafter rescheduled. There was testimony that if blood and urine tests were canceled, they would not be performed later unless specifically rescheduled. At the 22-month point, when the final sacrifice did take place, the defendants for various reasons were under pressure to end the study quickly. The blood and urine tests were not rescheduled.

The government contends that these tests were never conducted, which explains why the "raw data" for them could not be located. Technician Smith testified that he could not find raw blood and urine data to include in his draft of the Naprosyn report and that he brought this to Wright's attention along with his surmise that the work had not been performed. Wright did not take issue with this conclusion.

Technician Garrett testified that his responsibilities included setting up the rats for the blood and urine tests but that he had not done so, implying that the tests had not been performed. Yet ultimately, the final report contained blood and urine data for animals long dead at the time the blood and urine analysis would have been made.

Defendants argue that the government's proof rests solely on the absence of the raw data. In particular they contend that the inability to locate data is circumstantial evidence insufficient to establish that the data did not exist and was fabricated. Besides attacking the credibility of technician Garrett, the defendants maintain that any apparent errors in the reported blood and urine data indicate mere negligent recording of the actual data, not falsification of it. Proof of absence of records that would ordinarily exist if a particular event had occurred is properly admitted to show that the event did not occur. *See, e.g., Federal Rule of Evidence* 803(7); *United States v. Zeidman*, 540 F.2d 314, 319 (7th Cir. 1976). Despite the defendants' arguments, the jury had ample evidence to support a finding of falsification.

Appendix II was a report which contained allegedly fabricated gross pathology data for animals examined postmortem. The government presented evidence to show that the relevant log completely contradicted or left unsubstantiated findings authored by Plank in Appendix II. Technicians Smith, Garrett and Penner, among others, identified their records for specific animals and reported those animals that died during the study and were discarded without findings of any kind because they were too badly decomposed ("TBD"). Yet Plank included various gross pathology findings about these animals in Appendix II. The necropsy log frequently conflicted with results as reported in Appendix II in other respects as well. Presumably, if Plank's conclusions had been based on actual gross observations, they would have been confirmed by the necropsy log.

In order to justify Plank's Appendix II, defendants attempt to persuade us that Garrett performed necropsies that yielded the data reported by Plank. Yet Garrett and other technicians denied performing necropsies. Defendants also argue that several technicians never worked on the Naprosyn project, and therefore could not say whether or not necropsies were performed on TBD animals or whether or not results of gross examinations

of these animals were recorded on the backs of cage cards. Dr. Gordon testified that cage cards were not considered raw data and were not kept after a project was completed. Therefore, defendants assert it was unreasonable for the prosecution to contend, or for the jury to conclude, that, five years after the Naprosyn study was finished, IBT's failure to produce cage cards supports the inference that the cards contained no gross pathology data. But these matters, in light of all the other evidence, presented jury questions and there was sufficient evidence to support the jury's conclusions.

The government argues that Keplinger had knowledge of the falsifications of the blood and urine data and Appendix II because he never looked into the matter of missing data when given reason to do so. The defendants contend that there is insufficient evidence that Keplinger failed to do so, and, alternatively, even if he did not look into missing data, it is unreasonable to infer that he had knowledge of the falsification. Although failure to investigate the question of the missing data, considered in isolation, may not be sufficient to demonstrate Keplinger's participation in the scheme to defraud, in combination with other evidence, it entitled the jury to infer that Keplinger knew of the falsifications. We conclude the evidence on the blood and urine data and on Appendix II was sufficient.

C. *Mailings*

We next turn to the issue whether the government's evidence was sufficient to support the jury's findings that the Naprosyn and TCC reports were mailed, and that defendants caused those mailings. The use of the mails may be proved by direct or circumstantial evidence. *E.g.*, *United States v. Brooks*, 748 F.2d 1199, 1202 (7th Cir. 1984). The government points out that evidence of office custom and practice here may establish the fact of mailing. *See e.g.*, *United States v. Joyce*, 499 F.2d 9, 15 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974); *United States v. Flaxman*, 495 F.2d 344, 349 (7th Cir.), *cert. denied*, 419

U.S. 1031 (1974). Circumstantial proof often consists of evidence of office practice, and such testimony as to office practice is sufficient proof of mailing. *E.g., United States v. Ledesma*, 632 F.2d 670, 675 (7th Cir.), *cert. denied*, 449 U.S. 998 (1980).

Defendants, citing *United States v. Wolfson*, 322 F. Supp. 798 (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972), argue that the prosecution must show that the office procedure is "invariable." However, *Wolfson* is not binding on this court, and we have in fact subsequently held that proof of regular or usual business practice is sufficient. *See, e.g., United States v. Joyce*, 499 F.2d at 15. Since the government is under no duty to negate all possible innocent inferences from a set of circumstantial facts, see *United States v. Graves*, 736 F.2d 850, 854 (2d Cir. 1984), it should not be required to present proof that the custom is "invariable." Instead, it is sufficient to prove that mailing is the sender's regular business practice. The inference that the sender acted in accord with its ordinary practice is reasonable, and the absence of a recollection of departure from that practice strengthens the inference that the practice was followed.

There was evidence that IBT's Naprosyn submission to the FDA, dated November 11, 1976, was sent to lawyers for Syntex by Attorney Merrill Thompson with a cover letter, dated November 15, 1976. Thompson testified that his normal and customary business practice was to mail such letters to their addresses on or about the date they bore, together with any attachments. Defendants contend that Thompson's additional statement that such documents "would normally be sent" is too equivocal and leaves room for the inference that non-mail methods might have been used. Defendants cite *United States v. Hart*, 693 F.2d 286, 289 (3d Cir. 1982) for the proposition that "send" is too "generic" and may, but does not necessarily, mean "mail"; reports can be sent (without being mailed) by private courier service. Therefore, defendants assert that Thompson's statement that the report was "sent" is not sufficient to establish that an alleged mailing in fact occurred

and that, at most, only a probability of mailing is indicated. Notwithstanding this argument, proof of a company's office practice and its "usual course of business," while circumstantial, has been found sufficient to carry the question of mailing to the jury. *E.g., United States v. Scott*, 730 F.2d 143, 146-47 (4th Cir.), *cert. denied*, 105 S. Ct. 572 (1984). Here the government offered evidence of ordinary business practice and testimony by Thompson denying knowledge that the letter was sent by a method other than mail.[5]

With respect to the mailing of the TCC final report, technician Smith testified that the business practice was to mail a copy of the final report to the sponsor of the study. Defendants contend that Smith had no personal knowledge of the IBT's business practices and that his testimony was too "off-hand" to establish that the report was mailed. We believe that the testimony was sufficient to carry this question of mailing to the jury. Defendants presented other arguments on the mailing question which included evidence of a transmission by air courier service on May 8th about the time the TCC report was allegedly mailed, discrepancies in dates on the cover letter and final report and a Xerox mailing instruction sheet containing handwriting (which was not usually found on an IBT final report). Since the FDA's copy of the report did not contain any handwriting, defendants argue that the government's proof of mailing is inadequate.

The government showed that the May 8 air courier delivery was sent to Dr. Wright at Monsanto. Therefore, this delivery did not involve the mailing of the TCC final report charged in the indictment. That mailing was sent to a different Monsanto employee, Dan Roman, on or about May 12. As the government notes, the fact that

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[5] Additionally, the government's evidence was sufficient to show that the mailing was in furtherance of the scheme since defendants could reasonably foresee that the U.S. mails would be used to send the Naprosyn report to Syntex. *See, e.g., United States v. Gorny*, 732 F.2d 597, 601 (7th Cir. 1984).

IBT's mailing instruction sheet for the final report is dated May 12, a day after the date that a cover letter indicates Monsanto sent the report to the FDA, is explainable in several ways. The most likely inference from the evidence presented is that Monsanto had obtained a copy of the report before the copy sent to it on May 12th (perhaps through the May 8 courier delivery that defendants so painstakingly proved). The government also rebuts the contention that the handwriting on the IBT report was unusual by pointing to circumstantial evidence that the writing was added to the file copy after the report was actually mailed. In sum, the government offered evidence to show both that it was IBT's regular practice to mail copies of final reports to sponsors, and that IBT mailed the TCC report to Monsanto as charged in the indictment. The mere existence of conflicting evidence (which the government explains in a rational manner) does not establish an insufficiency of proof. *See, e.g., United States v. Goss*, 650 F.2d 1336, 1343 (5th Cir. 1981). We are of the opinion that the government presented enough evidence to take to the jury the issue whether the Naprosyn and the TCC final reports were mailed.

II.

Defendants next complain that a multitude of exhibits were erroneously admitted pursuant to the business records exception to the hearsay rule, FED. R. EVID. 803(6). The government intended to seek admission of about 194 documents which it characterized as IBT business records; these documents were listed on Government Exhibit WT-1. Generally, the IBT records consisted of interdepartmental memos, reports, data compilations and letters between IBT and its sponsors. In order to avoid the delay and confusion that would no doubt have arisen if the admissibility of each document were determined separately at the time it became relevant, the trial court approved a procedure whereby a government witness, Warren Thompson, provided foundation testimony at one time for all of the documents listed on WT-1. The court did not

immediately admit all of the documents into evidence, but over defense objections allowed government witnesses to testify about some of them, based on the government's representation that it would provide further foundation for their admission. Another document witness, Philip Smith, was later called to testify about the IBT records. After entertaining the parties' arguments as to admissibility and considering each document individually, the district court eventually overruled defendants' objections that the government had not provided sufficient foundation for admitting the IBT documents as business records. Defendants now contend that this "wholesale" approach to admission of the various exhibits was improper, and that about 70 exhibits did not meet every requirement and so were improperly admitted as evidence.[6]

Initially, we note that there is nothing inherently objectionable about the "wholesale" approach adopted by the trial court. Under that procedure the government witnesses provided foundation testimony about all of the documents at the same time and testified about large groups of documents by type (for example, memoranda and correspondence with sponsors). In a case of this magnitude, we see no need to require the government to elicit essentially identical foundation testimony separately for each exhibit offered. To the extent that defendants found it necessary to explore information relevant only to a particular document, they were able to do so. The district court considered each document separately. The court was quite understandably concerned that an approach other than eliciting "wholesale" foundation testimony would impede a sensible presentation of the evidence, and its decision to proceed in the manner it did

[6] According to defendants, 124 of the 194 documents listed on WT-1 either were not admitted, were withdrawn, were relevant only to charges of which the defendants were acquitted or were not received for the truth of their contents. Defendants challenge the admission of all of the remaining documents which the court allowed into evidence as business records.

was well within its discretion. *See United States v. Evans*, 572 F.2d 455, 490-91 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978).

The business records exception to the hearsay rule, FED. R. EVID. 803(6), provides that certain records of regularly conducted activity are not excluded by the hearsay rule. In light of the recognition that ordinary business records tend to be unusually reliable, the exception is designed to avoid the burdensome process of "producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering and transmitting, and recording information. . . ." *See* Notes of Advisory Committee on Proposed Rule 803. In order to be admissible, a record must be:

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information of the method or circumstances of preparation indicate lack of trustworthiness . . . .

The determinations whether a proper foundation has been laid for application of the business records exception to a particular document and whether the circumstances of the document's preparation indicate untrustworthiness are within the discretion of the trial court. *E.g., United States v. Cincotta*, 689 F.2d 238, 243 (1st Cir. 1982), *cert. denied*, 459 U.S. 991 (1983).

Defendants contend that the government failed to satisfy at least one of the primary foundation requirements for each document admitted pursuant to Rule 803(6) (or rather for each group of documents, since defendants also treat the admissibility question by category of documents,

rather than individually). First, defendants argue that neither of the two government document witnesses should properly have been considered a "custodian or other qualified witness," since neither witness had sufficient knowledge of IBT's record-making procedures. We disagree. Warren Thompson had worked at IBT in various capacities for eleven years, and testified that through his recent position as an auditor of studies, he was familiar with the types of documents created and maintained by IBT and offered as exhibits by the government. Philip Smith worked at IBT between 1971 and 1977 as an assistant toxicologist, responsible for scheduling rat studies, preparing study reports and auditing studies. He had seen about 50 to 60% of the documents in issue while working at IBT, and was generally familiar with the creation and maintenance of IBT records. Smith testified that each of the types of documents that the government sought to admit as business records (memoranda, correspondence with sponsors, and raw data) was created and maintained as part of the regularly conducted business activity at IBT; and was prepared by or from information transmitted by people with personal knowledge of the facts described in them, and was written about the time of the events described.

Although restated in various ways, defendants' arguments really boil down to the proposition that because Thompson and Smith did not personally participate in the creation of some of the documents, they were not qualified to say whether the preparers actually had personal knowledge of the facts described, when the documents were prepared in relation to the time of the events and like questions. But the business records exception contains no requirement that a "qualified witness" must have personally participated in the creation or maintenance of a document, *see, e.g., Itel Capital Corporation v. Cups Coal Company, Inc.*, 707 F.2d 1253, 1259-60 and n.13 (11th Cir. 1983); *Rosenberg v. Collins*, 624 F.2d 659, 665 (5th Cir. 1980); *United States v. Rose*, 562 F.2d 409, 410 (7th Cir. 1977), nor even know who actually recorded the informa-

tion, *see United States v. Verlin*, 466 F. Supp. 155, 158 (N.D. Tex. 1979). Obviously, such a requirement would eviscerate the business records exception, since no document could be admitted unless the preparer (and possibly others involved in the information-gathering process) personally testified as to its creation. Rather, the phrase "other qualified witness" in Rule 803(6) is to be given "the broadest possible interpretation"—the witness need only be someone who "understands the system." 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803 (6)[02] at 803-178. *See also United States v. Wables*, 731 F.2d 440, 449 (7th Cir. 1984) (witness must only have knowledge of procedures under which records created); *NLRB v. First Termite Control Company, Inc.*, 646 F.2d 424, 427 n.5 (9th Cir. 1981) (court quotes Notes of the Committee on the Judiciary Senate Report No. 93-1277, which indicate that party seeking to introduce evidence must show it was "regular practice" of the activity to base documents upon information provided by a person with knowledge). In sum, a "qualified witness" need only be someone with knowledge of the procedures governing the creation and maintenance of the type of records sought to be admitted; and this requirement was met here.

Defendants' other attacks on the government's foundation testimony fare no better and do not merit extended discussion. Although interoffice memoranda are sometimes excluded where they are not created in the course of regularly conducted business activity, *see, e.g., Niederkrome v. Commissioner of Internal Revenue*, 266 F.2d 238, 242 (9th Cir. 1958), *cert. denied*, 359 U.S. 945 (1959), they are, not surprisingly, admissible where they are created in the regular course of business, *see, e.g., United States v. McGrath*, 613 F.2d 361, 367-68 (2d Cir. 1979), *cert. denied*, 446 U.S. 967 (1980), and the testimony here indicated the latter. Similarly, the government witnesses testified that the documents were maintained in the course of a regularly conducted activity; the fact that some documents were not kept in IBT's central files does not refute the government's evidence that the documents

were regularly maintained. *See United States v. Hedman*, 630 F.2d 1184, 1197-98 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). The evidence that the pathology sheets and necropsy logs were prepared by persons with personal knowledge was also sufficient. A witness testified that the pathology sheets, which were the sources of data for the necropsy logs, were prepared by animal laboratory technicians. Thompson was an animal lab technician, and Smith wrote or audited reports that used the pathology sheet data; Smith testified that raw data was prepared by persons with personal knowledge. In the absence of any indication to the contrary, this testimony and the very nature of the data are sufficient to support the conclusion that the data were generated by someone with personal knowledge. *See United States v. McGrath*, 613 F.2d at 368 (evidence itself may afford the basis for inferring that it rests on firsthand knowledge). Letters created by another business but regularly received, maintained and relied upon by IBT, as was demonstrated here, may also constitute admissible business records of IBT. *See United States v. Flom*, 558 F.2d 1179, 1182-83 (5th Cir. 1977); *United States v. Pfieffer*, 539 F.2d 668, 670-71 (8th Cir. 1976).

Finally, various inaccuracies in the body weight books, cited by defendants as evidence of their lack of trustworthiness, are insufficient to demonstrate that the trial court abused its discretion in admitting them. Generally, objections that an exhibit may contain inaccuracies, ambiguities, or omissions go to the weight and not the admissibility of the evidence. *See, e.g., Matador Drilling Company, Inc. v. Post*, 662 F.2d 1190, 1199 (5th Cir. 1981). Of course, the source of the information about or the circumstances surrounding the preparation of a document may indicate that the document is insufficiently trustworthy to be admissible. *See* FED. R. EVID. 803(6). In the case before us, various testimony indicated that the animal technicians strove to measure and record the body weights accurately and generally did so. We doubt whether inaccuracies apparent on the face of a document

(as opposed to testimony about the unreliability of the procedure used to prepare it) should affect its admissibility as a business record, but in any event our review of the evidence persuades us that there was no abuse of discretion in the trial court's decision to admit the body weight books.

Defendants also contend that the admission of two exhibits violated their Sixth Amendment confrontational rights. The Confrontation Clause of the Sixth Amendment to the Constitution provides that in criminal prosecutions, "the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The confrontation clause and the federal rules limiting the use of hearsay declarations at trial protect similar values, but the conclusion that a statement is admissible under one of the exceptions to the hearsay rule does not eliminate the need to evaluate whether admission of the statement contravenes the defendant's right of confrontation. *See Mattes v. Gagnon*, 700 F.2d 1096, 1101 (7th Cir. 1983); *United States v. Perez*, 658 F.2d 654, 660 (9th Cir. 1981).

Without attempting to set forth a definitive test for evaluating hearsay testimony under the confrontation clause, the Supreme Court identified the general limitations on the use of hearsay in *Ohio v. Roberts*, 448 U.S. 56 (1980). First, the Sixth Amendment establishes a "rule of necessity," so that in the usual case, "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* at 65 (citations omitted). Second, once a witness is shown to be unavailable, it must also be demonstrated that the hearsay is trustworthy; it must bear sufficient "indicia of reliability."[7] *Id.* at 65-66. The

[7] The Supreme Court stated that reliability "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S. at 66. As defendants concede, the business records rule is such an exception, and we have already concluded that the exhibits at issue here were properly admitted under that rule.

rule of necessity is not absolute, however. The government need not produce the hearsay declarant or demonstrate his unavailability where "the utility of trial confrontation is remote." *Id.* at 65, n.7. Moreover (under the "*Dutton* exception"), at least where the evidence is neither "crucial" to the presentation, nor "devastating" to the defendant, the evidence may be admissible even though the necessity requirement is not met. *See Dutton v. Evans*, 400 U.S. 74, 87-89 (1970); *United States v. McClintock*, 748 F.2d 1278, 1292 (9th Cir. 1984). The district court relied largely on this "*Dutton* exception" in concluding that the confrontation clause was not violated by the admission of evidence here. *See United States v. Keplinger*, 572 F. Supp. 1068, 1071 (N.D. Ill. 1983).

Defendants complain that admission of two exhibits violated their rights to confrontation. The first exhibit, II-E-19, is the so-called "Kennedy memo." This is a memorandum by Gerald Kennedy from which it arguably can be inferred that after the final sacrifice of rats in the TCC study, Kennedy took tissues from rats in the late-started "research" study and added them to tissues from the original study for histopathological examination by Dr. Gordon. The memo also indicates different numbers for some animals than those given in a study report. The government argues that admission of this memorandum presents no confrontation problems at all, since the memo has no significance as hearsay, *i.e.* as a statement offered to prove the truth of the matter asserted, but was only significant because the memo was passed around and discussed at a meeting attended by defendants and so is relevant to show defendants' knowledge that animals had been commingled at the final sacrifice. Although we agree that the primary importance of the memo was to show defendants' knowledge, we cannot accept the government's argument that the memo presents no hearsay problems whatever. Our review of the record indicates that the Kennedy memo was offered and received as a business record, without limitation on the use to which the evidence could be put. Therefore, the jury could have

viewed the memo as direct evidence a) that Gerald Kennedy had given Dr. Gordon tissues from the late-started research animals and/or b) that Kennedy had changed the numbers of some animals. From these propositions the jury could have drawn the inference, suggested by the government, that Kennedy had changed the numbers *in order to* conceal the commingling of the late-started animals. Thus we cannot conclude that the hearsay aspect of the exhibit had no significance.

On the other hand, we are persuaded that the evidence was properly admitted under the *Dutton* rationale. Even though the government did not demonstrate the unavailability of the hearsay declarant, Gerald Kennedy, admission of the memo did not violate the confrontation clause if it was not "crucial" to the government or "devastating" to the defense, and if the utility of cross-examination of Kennedy was remote. The evidence was clear, and the defendants conceded, that Kennedy had indeed given Dr. Gordon slides of tissues from late-started animals. There was various other evidence indicating that numbers for some animals had been changed, including a handwritten reference in another exhibit to the renumbering in Kennedy's memo, and further testimony that several (unsuccessful) attempts had been made to match numbers of animals indicated in raw data to numbers used on a summary table. Thus, taken for its truth value, the memo was cumulative; it could only have helped to establish two propositions that were essentially indisputable, and so was hardly "crucial" to the government's case. Moreover, we also find it relevant that the memo was not accusatory in any fashion, nor was there any sort of direct statement that numbers had been changed in order to conceal commingling.

For similar reasons, we believe that the potential utility of cross-examination of Gerald Kennedy was remote. Although defendants acknowledge that in most instances cross-examination of the authors of business records would be pointless, they argue that cross-examination would have been fruitful here because the memo was ambiguous. In light of the other evidence presented we are not cer-

tain that the memo can be considered ambiguous, but in any event cross-examination of Kennedy would not appear to have been useful in clarifying any important question. The prime import of the memo is that its circulation at a meeting attended by defendants arguably should have put them on notice, if they did not already know, that commingling might have occurred. Kennedy did not attend that meeting; testimony by him as to his intentions in writing the memo and his perceptions of its meaning would not have been relevant to the issue of what *defendants* understood or should have understood from examining it. Moreover, since defendants conceded that Kennedy had given Gordon tissues from late-started animals, and since the memo shows on its face that some renumbering occurred, there is little possibility that defendants could have gained much benefit from cross-examining Kennedy about these matters. Defendants apparently would not have attempted to prove that these events did not occur, but only wanted to challenge the prosecution's "sinister interpretation" of them. But, as noted, Kennedy's intentions or beliefs (for example, about whether he changed the numbers in order to conceal the inclusion of tissues from late-started rats, or for some other innocent reason) would have been irrelevant to defendants' knowledge.

Defendants also argue that admission of the body weight books violated defendants' confrontational rights. The government used the body weight books primarily to support the inference that commingling had occurred. In particular, the government contended that 1) a dash in one weight interval followed by a weight in the next weight interval or 2) substantial weight fluctuations between weighing intervals meant that the rat in question had died and had been replaced by a late-started rat. Defendants argue that cross-examination with respect to the makers of the weight books was vital, since the meaning of a dash or weight fluctuation is ambiguous and may have meant something other than a death and replacement. But the government did produce six witnesses, each of whom ac-

tually made entries in the weight books or supervised the maintenance of the books. Two of these witnesses were technicians in charge of running the TCC study for most of its duration. The defense had the opportunity to cross-examine each of these witnesses, and indeed elicited from several an acknowledgement that weight fluctuations might have been attributable to factors that were known to other technicians other than animal death and substitution. Possibly these other technicians might have meant something other than a death when they used a dash. Thus, defendants did have the opportunity to cross-examine many if not all of the authors of the documents.

But defendants argue this was not enough. Without naming other technicians who might have recorded weights in the books, defendants contend that the government's failure to produce *all* contributors to the body weight books violated their rights. In the absence of the opportunity to cross-examine every technician who contributed to the exhibits, defendants say, they could not show that the innocent "possibilities" suggested on cross-examination were "actualities." We agree with the government that the potential utility of cross-examining such additional witnesses is negligible. First, the possibility that some additional technicians would testify that they had a significantly different understanding of the meaning of dashes or weight fluctuations than had those who already testified seems remote, if not wholly illusory. Second, even if a few technicians would have ascribed a different, "innocent," meaning to the use of dashes or to weight fluctuations, this could at most establish that not all of the dashes and fluctuations meant deaths and replacements; such evidence could not prove that commingling did not occur, given the testimony of the technicians who took the stand. Therefore we believe the body weight books fall within the *Dutton* exception to the confrontation rule, which otherwise would require a demonstration that all the makers of the record be produced as witnesses or shown to be unavailable.

III.

Defendants also contend that their convictions on Count I should be reversed, because the jury might have found them guilty on the basis of omissions from the final TCC report that may not properly be used to support a mail fraud conviction. In that report, defendants represented that T-1 was a no-effect level in the testis. As previously noted, a report by Dr. Ribelin, an independent consultant, had concluded that T-1 had no significant effect on the testis, but that degenerative changes in the epididymis indicated that a no-effect level had not been reached with respect to the epididymal tissue. Although aware of these conclusions, defendants did not include or refer to them in the final TCC report. The government maintained that this omission, among others, was fraudulent and the district court allowed this evidence to go to the jury on Count I.[8]

We find defendants' argument here wholly unpersuasive. It requires no extended discussion of authority to demonstrate that omissions or concealment of material information can constitute fraud cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation. *See, e.g., United States v. Lindsey*, 736 F.2d 433, 436-37 (7th Cir. 1984); *United States v. Margiotta*, 688 F.2d 108, 123-24 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). *See also United States v. Black*, 684 F.2d 481, 484 (7th Cir.), *cert. denied*, 459 U.S. 1043 (1982); *United States v. Shelton*, 669 F.2d 446, 456-58 (7th Cir.), *cert. denied*, 456 U.S. 934 (1982). Similarly, "[w]hile the existence of a fiduciary duty is relevant and an ingredient in some mail fraud prosecutions, . . . it is not an essential in all such cases."

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[8] The Court did not allow the jury to consider the omission in connection with Count V, which charged a violation of 18 U.S.C. § 1001, (prohibiting false statements) because the government had shown no specific legal duty to disclose the information omitted from the report.

United States v. Allen, 554 F.2d 398, 410 (10th Cir.), *cert. denied*, 434 U.S. 836 (1977) (citations and footnote omitted).[9] Obviously, we do not imply that all or even most instances of non-disclosure of information that someone might find relevant come within the purview of the mail fraud statute; nevertheless, under some circumstances concealment of material information is fraudulent. The scheme to defraud "is not to be measured by technicalities. Rather, the measure of fraud is its departure from moral uprightness, fundamental honesty, fair play and candid dealings in the general life of members in society." *United States v. Lindsey*, 736 F.2d at 436. Therefore fraud can be effected not only by deceitful statements but also by statements of half-truths or concealment of material facts. *See United States v. Townley*, 665 F.2d 579, 585 (5th Cir.), *cert. denied*, 456 U.S. 1010 (1982); *United States v. Allen*, 554 F.2d at 410.

We have already discussed in connection with the sufficiency of the evidence defendants' arguments that the omission of Ribelin's conclusions from the final report was not fraudulent; and we see no need to belabor the matter. Moreover, our review of the testimony has convinced us that the issues involving omissions were properly submitted to the jury. Defendants' heavy emphasis on the physiological differences between the testis and the epididymis does not advance their argument that the concealment of Ribelin's findings was not fraudulent. First, there was some evidence to support the inference that there was no significant difference between the two entities for purposes of evaluating the effect of TCC. At

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[9] In addition we note that defendants requested no instruction below to the effect that the jury had to find a fiduciary or special relationship before it could find a duty to disclose. This failure (in the absence of plain error) defeats their claim on appeal that such an instruction was required. Defendants did request an instruction that the jury was required to find a "legal duty to disclose" the omitted information in order to find that the omissions were fraudulent, but, for the reasons we have noted, that statement would not have been an accurate summary of the law.

least, Dr. Ribelin regarded his findings on the epididymis to be within the area of relevance to the question whether TCC affected the testis. More important, let us assume that the testis and epididymis are wholly distinct organs. This assumption would only imply that the statement that T-1 was a no-effect level in the testis was not, given Dr. Ribelin's conclusions, a bald misrepresentation. This state of affairs does not imply, however, that it was not fraudulent for defendants to have omitted any mention of Ribelin's conclusions from the report. There was ample testimony at trial to the effect that the purpose of the TCC study was to determine whether there was a level at which TCC could be administered without causing ill effects. There was evidence that, while the testes were selected as the target organs, any information about significant effects in other areas would be relevant and important to the central question whether TCC could be safely used in humans. Therefore, there was evidence that Dr. Ribelin's findings should have been included.[10] Of course, defendants presented testimony to the opposite effect. But this only means that there was a real issue as to whether defendants' failure to mention Dr. Ribelin's conclusions was fraudulent, which we believe was properly submitted to the jury for resolution. Again, we do not imply that every omission from a scientific report of potentially important information could form the basis of a mail fraud conviction; in this case, however, where the government presented strong evidence of a scheme to defraud consisting of a wide variety of deceptive actions,

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[10] Incidentally, we note that the inclusion of female rats in the study seems to refute the proposition that the possibility of effects on the testis was the only concern of, rather than merely the focus of, the project. Since female rats obviously could not enlighten the scientists as to testicular effects, they must have served some other purpose. Presumably, had they suffered obvious ill effects from TCC, defendants would have been obligated to mention such findings. We do not rely on this reasoning since the parties have not suggested it; we merely find the issue curious.

we believe the omission could properly be considered as part of that scheme.[11]

IV.

Prior to trial, all defendants moved to suppress certain testimony and materials which they alleged were obtained in violation of their attorney-client privilege. Merrill Thompson and Fred Current were two attorneys hired by Nalco, Inc., IBT's parent corporation, to represent IBT as a corporation. It was undisputed that an attorney-client relationship existed between IBT and Thompson and Current, and that IBT waived its corporate attorney-client privilege as to all matters relating to this case. Defendants contended, however, that an attorney-client relationship also existed with respect to each of them individually, so that communications made by them to Thompson and Current were protected despite IBT's waiver of its privilege. The trial court held an extensive six-day hearing on this matter, at which testimony from the two attorneys, as well as Keplinger and Plank,[12] among others, was received. Thereafter the court entered a written opinion which included detailed factual findings and concluded that defendants had failed to establish the existence of an attorney-client relationship between themselves individually and the corporate attorneys. Defendants now argue that the court's factual findings were either unsupported by the evidence, or legally immaterial.

We apply the clearly erroneous standard in reviewing the trial court's findings of fact. The Supreme Court has recently had occasion to clarify the meaning of that stand-

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[11] We reach the same conclusion with respect to the omission of the post-mortem table, although we see no need to discuss the sufficiency of evidence on that point.

[12] The defendant Wright did not claim any attorney-client privilege, but joined the other defendants' motion to suppress on the basis that the attorneys' testimony would "taint" his defense efforts.

ard in *Anderson v. City of Bessemer City*, 105 S. Ct. 1504 (1985). The Court explained:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
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> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings . . . . [w]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Id. at 1512-13 (citations omitted). These principles apply with special force in this case, since the testimony of the attorneys and that of the defendants directly conflicted in several important particulars, and the trial court was careful to note that it found both Thompson and Current to be "highly credible witnesses."

This court has adopted a number of well-settled principles governing the creation and scope of the attorney-client privilege. In general:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 319 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963) (quoting 8 J. Wigmore, EVIDENCE § 2285 (Rev. ed. 1961)). The district court here found that defendants had failed to demonstrate the existence of several necessary requirements for creation of individual attorney-client relationships between themselves and the IBT corporate attorneys. In particular, the court found that no express agreement for individual representation was made, nor did any of the defendants ever ask the attorneys directly or indirectly to represent him individually. In addition, the court found that the circumstances were not such as to support a finding of any implied individual representation. The defendants never sought individual legal advice or asked questions relating to personal representation, and, quite importantly, never made any confidential statements of an incriminating nature to the attorneys,[13] from which it could be inferred that the defendants believed that the attorneys were representing them individually. Neither attorney believed they represented the defendants individually, nor did they believe the defendants thought they enjoyed such representation. Indeed, the district court stated that credible testimony indicates that the relationship between the attorneys and the defendants actually was somewhat adversarial, and by December 1976, had become confrontational. Finally, the court found that communications made by the defendants were not in confidence, both because the information communicated was intended to be disclosed in IBT's responses to the FDA's

[13] In this respect we note that defendants have largely failed to identify specific communications which are claimed to be privileged and which were the subject of testimony at trial, other than occasional examples of statements as to which defendants have not explained the relevant circumstances. As this court has noted, however, the "claim of privilege must be made and sustained on a question-by-question . . . basis; a blanket claim of privilege is unacceptable." *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983).

inquiries and because most of defendants' statements to attorneys were made in the presence of third parties.

We believe that the district court's findings were fully supported by the evidence. Defendants do not dispute the attorneys' testimony that defendants never explicitly sought individual legal advice, or asked about individual representation, nor did the attorneys ever indicate to defendants their belief that such a relationship existed. (To the contrary Thompson testified that he once told Plank explicitly that he was not Plank's lawyer.) Defendants merely argue in various ways that they subjectively believed that the attorneys represented them individually, on the basis of such circumstances as Thompson's appearance with Keplinger at a meeting with the FDA.[14]

Defendants cite *Westinghouse Electric Corporation v. Kerr-McGee Corporation*, 580 F.2d 1311, 1319 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) for the proposition that the scope of the attorney-client relationship " 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.' " *Id.* at 1319 (quoting *McCormick on Evi-*

[14] In this respect defendants cite *E.F. Hutton & Company v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969), for the proposition that an attorney's appearance on behalf of a corporate employee individually at a judicial or quasi-judicial proceeding raises a presumption of individual representation. *See id.* at 387. But in that case at two hearings the employee identified the attorneys as his personal counsel, and the attorneys said nothing to contradict that statement, and at both hearings the attorneys entered formal appearance on behalf of the employee individually. Here, on the other hand no such formal appearance was entered, and Keplinger made no statement that Thompson was his personal attorney. Certain statements by FDA personnel referring to Thompson as "your attorney," were ambiguous, and other circumstances (such as Keplinger's introduction of Thompson as "outside legal counsel") indicated corporate rather than individual representation. In short, there is ample support for the district court's finding that the attorneys appeared at such proceedings as counsel for the corporation only.

dence § 88 at 179 (2d ed. 1972)). But while we do not quibble with that statement, we do not believe it can be deemed equivalent to defendants' implicit argument that an individual's mere subjective belief that he is represented individually will always be sufficient to demonstrate that such a relationship existed for the purpose of the attorney-client privilege. First, the quoted language refers to the client's "*manifested* intention" to seek legal advice. As already noted, there is little or no evidence in this case that defendants either sought legal advice on an individual basis or manifested in any way their belief that they were being represented individually. Moreover, at least in the absence of any relatively clear indication by the potential client to the attorney that he believed he was being individually represented, we think no individual attorney-client relationship can be inferred without some finding that the potential client's subjective belief is minimally reasonable. For example, in *Westinghouse*, the attorneys had specifically represented that the information disclosed to them by the individual clients would be kept confidential. *See* 580 F.2d at 1314, 1321. *See also In re Grand Jury Proceedings (Jackier)*, 434 F. Supp. 648, 650 (E.D. Mich. 1977) (corporate officer may invoke attorney-client privilege individually only if he "makes it clear when he is consulting the company lawyer that he personally is consulting the lawyer, and the lawyer sees fit to accept and give communication knowing the possible conflicts that could arise . . . ."), *aff'd*, 570 F.2d 562 (6th Cir. 1978). In sum, the district court's findings were not clearly erroneous and its conclusion that defendants could not invoke the attorney-client privilege to suppress the attorneys' testimony was correct.

Defendants also contend that the attorneys should have been prevented from testifying on the basis of the "joint defense" doctrine, which generally allows a defendant to assert the attorney-client privilege to protect his statements made in confidence not to his own lawyer, but to an attorney for a co-defendant for a common purpose related to the defense of both. *See, e.g., United States*

v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979). Thus defendants argue that (largely unspecified) communications they made to Thompson and Current while those attorneys represented IBT may not be disclosed because they were made in the course of cooperating about a matter of common interest. We have serious doubts whether IBT and the individual defendants really shared a "common purpose" in the sense necessary to support application of the joint defense doctrine. Regardless, however, defendants' argument is defeated by the trial court's finding that the communications made by the defendants to the attorneys were not in confidence. That finding is not clearly erroneous, and so the joint-defense doctrine, even if otherwise applicable, does not prevent their disclosure. *See, e.g., United States v. McPartlin*, 595 F.2d at 1336.

V.

At trial, neither the government nor the defendants called Gerald Kennedy as a witness. Defendants argue that the district court erred in refusing to give a "missing witness" instruction based on the fact that the government did not call Kennedy, or in allowing defendants to comment on Kennedy's absence in closing argument. " 'The rule . . . is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.' " *United States v. Mahone*, 537 F.2d 922, 926 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976) (quoting *Graves v. United States*, 150 U.S. 118, 121 (1893)). We assume for the sake of argument that Kennedy's testimony would have "elucidated the transactions" at issue, since as a member of IBT's "core group," he was involved in many relevant aspects of the TCC study. It is also undisputed that Kennedy was physically available to both sides. Thus the only issue we must address is whether, in some pragmatic sense, Kennedy was peculiarly within

the government's power to produce. *See United States v. Mahone*, 537 F.2d at 926.

A party can show that an absent witness is effectively within the other party's control, by establishing, for example, that the witness is biased in favor of the opposing party or has some other reason to testify solely on that party's behalf. *See United States v. Mahone*, 537 F.2d at 926-27. Defendants make several arguments to support the conclusion that Kennedy was peculiarly within the government's control. First is the bizarre contention that because the government immunized Kennedy from prosecution in order to obtain his testimony before the grand jury, he was effectively unavailable to defendants. In the usual case, a defendant argues the precise opposite—that a witness is within the government's control because the government has *refused* to immunize him, and it can be presumed that he would refuse to testify on grounds of self-incrimination. *See, e.g., United States v. Flomenhoft*, 714 F.2d 708, 713-14 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1420 (1984). But defendants reason that because Kennedy's immunity grant was conditioned upon his giving truthful testimony, had Kennedy testified for the defense, and contrary to his prior grand jury testimony, he would have subjected himself to perjury charges. On that rationale, any witness who testified favorably toward the government at grand jury proceedings could later be considered unavailable because he might be unwilling to perjure himself by changing his story in favor of the defense. This argument is quite unpersuasive.

Defendants offer a variety of other reasons why Kennedy should be considered within the government's control, none of which have merit. Kennedy is not an informant, nor is there any evidence that he would have been "vindicated by a conviction of the defendant[s]." *See United States v. Mahone*, 537 F.2d at 927. To the contrary, Kennedy could be expected to prefer rather strongly a not-guilty verdict, given his close involvement with the TCC study and his status as an unindicted co-conspirator.[15]

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[15] See footnote 19 *infra*.

Kennedy's cooperation with the government prior to his grand jury testimony also is insufficient to demonstrate that he was effectively unavailable to the defense. Even where a witness entirely refuses to discuss a case with the defense, a missing witness instruction may be appropriately denied. *See United States v. Grizaffi*, 471 F.2d 69, 74 (7th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973). Yet in this case, Kennedy met with defense counsel on several occasions, with no government representative present. In sum, there is no indication that Kennedy was "peculiarly within the government's control" and therefore the district court properly refused a missing witness instruction.[16]

For the same reasons, it was not error for the district court to preclude defendants from arguing the missing witness inference to the jury in closing argument. In a close case, it may be appropriate to allow a party to comment in argument on the significance of a witness' absence, even where there is insufficient evidence of unavailability to warrant a missing witness instruction. *See Chicago College of Osteopathic Medicine v. George A. Fuller Company*, 719 F.2d 1335, 1352-54 (7th Cir. 1983); *United States v. Mahone*, 537 F.2d at 927-28. But where the witness appears to be equally available or unavailable to both sides, we think it is well within the district court's discretion to refuse to allow such argument. *See, e.g., Chicago College of Osteopathic Medicine v. George A. Fuller Company*, 719 F.2d at 1352-53.[17] In some such

[16] The most likely explanation for Kennedy's absence at trial, suggested at oral argument, appears to be that he had made inconsistent statements at various times and so as a matter of trial strategy both parties were reluctant to call him as a witness. In any event, we conclude he was equally "available" to both sides.

[17] *Cf. United States v. Greschner*, 647 F.2d 740 (7th Cir. 1981). In that case the court stated in dicta that where a witness was available to both sides but was not called, both sides should be allowed to comment on the other side's failure to produce the witness. *Id.* at 743 n.6. In light of subsequent cases, *see, e.g., Chicago*

(Footnote continued on following page)

cases, both sides presumably would argue that the missing person's testimony would have been unfavorable to the other party, which at least in a complex case like this one would allow the jury to speculate about the meaning of a great deal of non-evidence. We see no constructive purpose to be served by such a procedure, and conclude the district court did not abuse its discretion in preventing commentary on Kennedy's absence in closing argument.

VI.

Defendants also contend that the district court erred in allowing Dr. Gordon to testify for the government despite the fact that prior to trial he had undergone hypnosis in part to enhance his memory of events about which he testified. Between April 1979 and August 1980, while a criminal investigation of IBT was underway, the government interviewed Dr. Gordon at various times. In the fall of 1980, Dr. Gordon's attorney in the investigation suggested that Dr. Gordon seek help to alleviate stress he was experiencing in part due to his inability to recall certain relevant events. Dr. Gordon eventually saw Dr. John Adams, a psychologist at Northwestern Medical School who had experience in enhancing memory with hypnosis. Dr. Gordon saw Dr. Adams over five sessions; at four of the sessions Dr. Gordon underwent hypnosis. These sessions had the dual goals of relieving Dr. Gordon's stress and enhancing his memory. The government apparently was not aware that Dr. Gordon was seeing Dr. Adams.

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[17] *continued*
College of Osteopathic Medicine v. George A. Fuller Company, 719 F.2d at 1352-53, we do not read *Greschner* to mean that the court must allow such argument but only that the court has discretion to do so. In any event, the court's refusal to permit argument on the missing witness question in this case would at worst be harmless error. *See, e.g., Chicago College of Osteopathic Medicine v. George A. Fuller Company*, 719 F.2d at 1353-54; *United States v. Mahone*, 537 F.2d at 927-28.

Defendants contended at trial that Dr. Gordon's post-hypnotic testimony was so unreliable that it should be excluded, as the result of dangers that may be associated with post-hypnotic testimony generally,[18] and their view that such dangers were present in this case. Defendants presented an expert witness, Dr. Bernard Diamond, who testified to this effect. The court also heard testimony by Dr. Adams, Dr. Gordon and Dr. Gordon's attorney, which concerned, among other things, Dr. Gordon's recollections both prior to and after the hypnotic sessions and Dr. Adams' knowledge of the underlying events that were of concern to Dr. Gordon. In addition to this extensive voir dire, the court reviewed a significant amount of case authority and professional literature concerning the reliability of post-hypnotic testimony. The court subsequently ruled that Dr. Gordon was competent to testify despite his experience with hypnosis.

Defendants have made very broad arguments in support of their contention that this court should adopt a rule prohibiting post-hypnotic testimony *per se* (regardless of the circumstances involved) or, at the very least, adopt a comprehensive set of standards that would govern the admissibility of post-hypnotic testimony in all cases (and would, of course, operate to exclude the testimony admitted here). We decline to adopt a *per se* rule that would exclude, under any circumstances, testimony of persons who previously underwent hypnosis, concerning a subject

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[18] *See United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984) for a good discussion of the problems that may arise when a witness testifies about events after his memory of such events has been enhanced by hypnosis. Among other problems, the witness may be easily influenced by (even inadvertent) external suggestions as well as internal pressure to produce a complete and logical account of the relevant events. Equally dangerous, the witness may not thereafter be able to distinguish between true memories existing prior to hypnosis and pseudomemories resulting from the hypnotic interaction. Yet his confidence in the accuracy of *both* memories and pseudomemories may be greatly strengthened. *See id.* at 1201-02.

which might have been involved in the hypnotic sessions. Defendants have simply offered no reason for us to seriously consider doing so. Moreover, while we are well aware that the reliability of post-hypnotic testimony poses a recurring and serious question, we see no need to pronounce general standards governing admissibility. Even accepting, for the purposes of this case, defendants' proposed standards, it is clear that the district court did not abuse its discretion in admitting Dr. Gordon's testimony.

Defendants suggest that, in order to demonstrate that post-hypnotic testimony "is free from the distorting effects inherent in hypnosis," the government should have demonstrated either a) that adequate safeguards were followed before and during hypnosis to minimize hypnotic distortions of memory, or b) that Gordon's trial testimony reflected only statements clearly demonstrated to have been made prior to hypnosis. Wright's Reply Br. at 7. But what defendants largely ignore is that the district court made several explicit factual findings that show that the government met the requirements defendants propose. Most important, the court found that the attempt to enhance Dr. Gordon's memory was, quite simply, unsuccessful; no additional items of memory were induced. If this finding is correct, then by definition Dr. Gordon's trial testimony must only have concerned events about which he had knowledge and memory independent of the hypnosis. This finding alone distinguishes this case from others in which there is no doubt that the witness's memory was enhanced and the court must decide whether that "memory" is sufficiently reliable to justify admission. *See, e.g., United States v. Valdez*, 722 F.2d at 1196. Moreover, the district court made other findings that buttress its conclusion that the dangers associated with post-hypnotic testimony were minimized here. First, the court found that the prosecution had not initiated or participated in the hypnosis, thus minimizing the chance that it could have deliberately or inadvertently suggested new "memories" to Dr. Gordon. To similar effect, the court found that Dr. Adams was not given any detailed knowledge

about the underlying facts of the case, and so he did not have enough information to allow him to suggest significant new memories. Thus, according to the district court's findings, there was no apparent source from which Dr. Gordon could have acquired new memories about the relevant events, nor was there any evidence that Dr. Gordon had in fact acquired such memories. Based on these findings, the court concluded that any prejudice caused by Dr. Gordon's testimony did not substantially outweigh the probative value of that testimony, and so admitted it.

But defendants contend that the hypnotic sessions must have enhanced Dr. Gordon's memory, because only after those sessions did Dr. Gordon "remember" that he believed he had been pressured by defendants in a meeting in February 1976 to change his opinion about whether T-1 was a no-effect level. We disagree. First, generally, both Dr. Gordon and Dr. Adams specifically testified that Dr. Gordon did not have any new memories as the result of the hypnotic sessions. Second, notes of government interviews of Dr. Gordon prior to his hypnosis appear to refer specifically to his feeling about being pressured into changing his views about whether T-1 was an effect level. Defendants make various arguments in an attempt to persuade us that these references have other meanings, which we need not detail here. We have reviewed the testimony as well as the interview notes and are persuaded that the district court's finding that Dr. Gordon's memory was not enhanced by the hypnosis was correct (or, at least, not clearly erroneous).

Based on these facts, we conclude that the district court did not abuse its discretion in admitting Dr. Gordon's testimony. We emphasize that our holding is a narrow one, and rests on the unique facts of this case: a case in which Gordon himself decided to resort to a hypnotist, the hypnotist had no contact with the prosecution and had not been told what the prosecution's theory was, no additional recollections came from the hypnosis and Gordon testified to no more than what he had told government agents prior to the hypnosis. Given these and other factors, we

believe the dangers of post-hypnotic testimony were sufficiently remote that Dr. Gordon's testimony was properly admitted.

VII.

For the foregoing reasons,[19] the judgments of conviction are AFFIRMED.

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[19] Defendants have made a number of other arguments that we do not believe warrant extension of an already lengthy opinion. Among other things, defendants complain that statements of three individuals—Dr. Kinoshita, Gerald Kennedy and Manny Reyna—were erroneously admitted under FED. R. EVID. 801(d)(2)(E). Under that rule a statement is not hearsay if the statement is offered against a party and is a statement by a party's co-conspirator during the course and in furtherance of the conspiracy. The government must establish by a preponderance of the evidence, independent of the statement itself, that a conspiracy existed, that the declarant was a member of the conspiracy, and that the statement was made in the course of the conspiracy. *E.g.*, *United States v. Xheka*, 704 F.2d 974, 985 (7th Cir.), *cert. denied*, 104 S. Ct. 486 (1983). Most of the statements about which defendants complain were admitted through the testimony of Merrill Thompson, IBT's attorney, who testified about events and statements that occurred during the course of meetings at which members of the "core group" were present. In many cases, Thompson did not attribute a statement to a particular person present at the meeting. Since that group included Kinoshita and Kennedy, some of the information imparted to Thompson may have been attributable to one of those individuals and therefore may have constituted hearsay. We find no error in the admission of the statement, for several reasons. First, many of the "statements" simply were not hearsay, and so were admissible regardless of the application of 801(d)(2)(E). Second, we find no error in the district court's conclusion that the government sufficiently established the elements necessary to support admission of the statements that were hearsay under that exception. In addition, we conclude that the "statements" were in general of such relative insignificance (largely because the assertions contained in them were uncontested, or supported by a great deal of other evidence) that their admission, even if erroneous, would not support reversal.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[19] *continued*

Defendants also vigorously argue that a new trial is required because various evidence and argument regarding lab conditions as well as Dr. Ribelin's findings were improperly allowed and thereby denied defendants a fair trial. With regard to lab conditions, the evidence was undoubtedly relevant to several issues. The only question is whether its probative value was substantially outweighed by the danger of undue prejudice, a question which the trial court has wide discretion to resolve. *See, e.g., United States v. Cowsen*, 530 F.2d 734, 738 (7th Cir. 1976), *cert. denied*, 426 U.S. 906 (1976). The defendants' approach to appellate argument in this case has necessitated that we review a substantial portion of the massive record in this case. Contrary to defendants' contention that the government deliberately portrayed the defendants as animal abusers in a way sure to inflame the jury's passions, we believe the evidence and argument about inhumane lab conditions was entirely appropriate. We also believe that the government's reference to Dr. Ribelin's findings did not unfairly prejudice the trial. Our review of the testimony indicates that there was some room for legitimate dispute about the relationship of the epididymis to the testis vis-a-vis the significance of Dr. Ribelin's conclusions. More important, even if the government on occasion misstated this evidence, it more often was careful to clarify it. This point was beaten to death at trial and we are sure the jury was not unfairly influenced by the prosecutor's characterizations.

Some of the parties' relatively minor arguments have not been addressed in this opinion. We have carefully reviewed all of the parties' contentions, and anything not discussed here has been found to be either insignificant or without merit.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 21, 1986

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. WILLIAM P. GRAY, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 84-1639 vs.

MORENO L. KEPLINGER, PAUL L. WRIGHT, and JAMES B. PLANK,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 81 CR 235—John A. Nordberg, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by the defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is, hereby DENIED.

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* The Honorable William P. Gray, Senior District Judge for the Central District of California, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. A-781

MORENO L. KEPLINGER, ET AL.,

Applicants,

v.

UNITED STATES

ORDER EXTENDING TIME
TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 13, 1986.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of April, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

JOSEPH CALANDRA, et al.

No. 81 CR 235—John A. Nordberg, District Judge.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on motion of all four defendants to suppress testimony and materials allegedly obtained in violation of the attorney-client privilege.

An evidentiary hearing on the matter was held from March 23-28, 1983. The Court has reviewed the written motions and memoranda submitted by the parties, considered the oral arguments of counsel and the testimony of the witnesses, and considered all the evidence presented, including the exhibits received in evidence and the Court's extensive trial notes, as well as reviewed the case authority presented. In judging the credibility of each witness and the weight to be given to the testimony of each, the Court has taken into account for each witness the intelligence, ability and opportunity to observe, the age, the memory, the manner while testifying, any interest, bias, or prejudice the witness may have, and the reasonableness of the testimony considered in the light of all the evidence in the case.

FINDINGS OF FACT

1. Merrill Thompson and Fred Current were two attorneys hired by Nalco, Inc., the parent corporation of Industrial Bio-Test Laboratories, Inc. ("IBT"), to represent IBT as a corporation.[1] All time records and billings for Merrill Thompson's legal services were only in the name of IBT. They were sent to IBT, not to any individual defendants, and the bills were paid only by the corporation. Fred Current did not bill any of the defendants for legal services. It is undisputed that an attorney-client relationship existed between the corporation and these attorneys, and that IBT waived its corporate attorney-client privilege as to all matters relating to this case.

2. It is also clear from the testimony of Fred Current and Merrill Thompson, both of whom the Court finds to be highly credible witnesses, as well as the exhibits, that neither attorney believed they [sic] represented the defendants individually, nor did they [sic] believe that the defendants believed that either attorney was representing them individually.

3. No express agreement for individual representation was made between the individual defendants and the corporate attorneys. All the defendants knew that the corporate attorneys represented the corporation and were protecting the corporation's interests. The attorneys appeared at all meetings and other proceedings as counsel for the corporation, appearing with corporate employees on behalf of the corporation in the course of an investigation of the corporation, not as counsel for the individuals.[2] None of the defendants asked the corporate attorneys either directly or indirectly to represent them as individuals, and no arrangements for payment for individual representation were ever made. All legal work was performed for and on behalf of the Company.

4. Nothing in the record indicates that these defendants sought individual legal advice or asked questions relating to personal legal representation, from which an attorney-client relationship could be implied, or on which a reason-

able belief by the defendants that they were being represented individually could be based. Further, there is no evidence of any confidential statements of an incriminating nature made by any defendants to these attorneys from which it could be inferred that the defendants believed that the attorneys were representing them individually.

5. The corporate lawyers were given the task of investigating at IBT to find the truth to report to the FDA. Credible testimony by Merrill Thompson and others indicates that the relationship between Thompson and the defendants was in fact somewhat adversarial, and that by December, 1976, their relationships had become confrontational. This evidence demonstrates that the defendants did not reasonably believe that the attorneys were representing them individually.

6. Based on all of the above, the Court finds that there was no express or implied individual legal representation of the defendants by the corporate attorneys, and that the defendants did not reasonably believe that they were being represented individually by either of them.

7. The Court also finds that communications made by the defendants to the attorneys were not in confidence. All discussions between the defendants and the corporate attorneys were for the purpose of preparing the corporation's response to the FDA. All the defendants knew that the purpose of these discussions was to use and disclose the information provided by them in IBT's responses to the FDA's inquiries. Thus, the defendants could not reasonably have expected that their communications with the attorneys would not be disclosed in their entirety. Moreover, most of the statements by the defendants to the attorneys were made in the presence of others, thereby destroying any confidentiality which might otherwise have existed.

8. The Court further finds that neither the attorneys nor the corporation said anything or took any action which mislead [sic] the defendants into reasonably believing that they were or would be individually represented by the attorneys.

CONCLUSIONS OF LAW

1. The attorney-client privilege applies as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Radiant Burners, Inc. v. American Gas Association, 320 F.2d 314, 319 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

2. Because the privilege interferes with the truth-finding process, it must not be lightly created, and must be strictly construed. *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108 (1974); *In the Matter of Carl Walsh*, 623 F.2d 489 (7th Cir. 1980); *In Re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1033 (S.D. N.Y. 1975).

3. Where an individual employee communicates as a representative of a corporation with an attorney for the corporation, the relationship which arises from the relationship is between the company and the attorney, not between the individual and the attorney. If the individual employee makes it clear, when he is consulting the company lawyer, that he personally is consulting the lawyer, and the lawyer accepts the communication, the individual may have a privilege. But, when there is no indication to the company's lawyer that the lawyer is to act in any other capacity than as lawyer for the company in giving and receiving communications from control group personnel, no attorney-client relationship exists, and therefore no attorney-client privilege may be asserted by the individual employee. *In Re Grand Jury Proceedings (Jackier)*, 434 F. Supp. 648, 650 (E.D. Mich. 1977), *affirmed*, 570 F.2d 562 (6th Cir. 1978).

4. Defendants have failed to meet the requirements established in *Radiant Burners, supra*, for asserting the

attorney-client privilege. Most importantly, defendants have failed to establish the existence of an attorney-client relationship between themselves individually and the corporate attorneys. The Court finds that no attorney-client relationship existed between the defendants and the attorneys in fact or in law. There was no express agreement of individual representation between the defendants and the attorneys, and no facts from which an agreement of individual representation could be implied. Further, there were [sic] no evidence of anything on which the defendants could base a reasonable belief that they were represented individually by the attorneys. The defendants could not reasonably believe that a corporate lawyer, who was given the task of investigating to find the truth to report to the FDA for the corporation in response to an investigation of the corporation, from whom they neither sought nor received personal legal advice, could also be expected to individually represent the corporation's employees. The Court therefore concludes that in this case, as in *Jackier, supra,* in the absence of any indication to the corporation's lawyers that they were to act in any other capacity than as lawyers for the corporation in giving and receiving communications from employees, no individual attorney-client relationship exists, and no individual attorney-client privilege may be asserted.[3]

5. Further, even if an attorney-client relationship somehow existed between the defendants and the attorneys, the defendants could not assert the privilege because no personal legal advice was sought and the communications to the attorneys were not made in confidence as required under *Radiant Burners, supra.*

CONCLUSION

Based on the foregoing, the Court concludes that no attorney-client privilege applies to bar the testimony of Messrs. Current and Thompson or to exclude any evidence obtained through them. Defendants' motions to suppress are therefore denied.

The Court reserves the right, however, to exercise its discretion to exclude any possibly confidential individual admissions that may have been made by any of the defendants to the corporate attorneys under Rule 403 of the Federal Rules of Evidence to prevent unfair prejudice to the defendants, in accordance with the balancing tests prescribed in that rule.

ENTER:

/s/ John A. Nordberg
District Judge

Dated: March 31, 1983

[FOOTNOTES]

[1] Merrill Thompson, a partner in the firm of Chadwell, Kayser, Ruggles, McGee & Hastings, Ltd., was hired as outside counsel to IBT to handle the FDA investigation of IBT. Fred Current is a staff attorney for Nalco, Inc., who was assigned to IBT in November, 1976 to assist with the FDA investigation.

[2] The November 12, 1976 meeting at the FDA was clearly between the FDA and IBT as a corporation through its representatives. There was no indication that any individual defendants had been called to the meeting, nor were any defendants asked if they were individually represented by counsel. The attorneys were presented and acted as attorneys for the corporation.

[3] This case is distinguishable from *E.F. Hutton Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969), on two bases. First, the attorneys in *Hutton* appeared at an SEC hearing and a bankrupty hearing on behalf of the employee individually, providing more justification for inferring an attorney-client relationship between the attorneys and the individual. At each hearing, the individual identified the attorneys as his personal counsel and the attorneys said nothing to refute this. Second, that case involved the disqualification of a firm from representing the corporate client in an action by the corporation against the individual, and therefore involved far different policy considerations than cases such as this, in which application of the attorney-client privilege would inhibit the fact-finding process in a criminal proceeding. As noted above, the Seventh Circuit has cautioned that this privilege should not be lightly created nor expansively construed when it is applied in derogation of the search for the truth. *In the Matter of Walsh*, 623 F.2d 489, 493 (7th Cir. 1980).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-1583 to 83-1586

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH C. CALANDRA, MORENO KEPLINGER,
PAUL L. WRIGHT, and JAMES B. PLANK,

Defendants-Appellants.

ARGUED APRIL 20, 1983—DECIDED MAY 3, 1983

Before PELL, BAUER and WOOD, *Circuit Judges.*

PER CURIAM. This is an expedited consolidated appeal from the district court order denying defendants' motion to suppress. The motion to suppress was based on the assertion by defendants that an attorney-client privilege existed which would bar the testimony of two lawyers to be called by the government at trial, or any evidence obtained by the government through those lawyers. Initially we dismissed this appeal for want of jurisdiction, then vacated that order and heard oral arguments. Again we dismiss this appeal for want of jurisdiction.

In April of 1976, the Food and Drug Administration (FDA) began an investigation of Industrial Bio-Test Laboratories, Inc. (IBT), an independent contract laboratory which conducted animal studies on various drugs, pesticides, chemicals and other substances on behalf of the sponsors or manufacturers of the substances, to determine

their safety and effectiveness. In November of 1977 the FDA first made accusations against the individual defendants.

Defendant Calandra, the original founder of IBT, was a Director and the President of the company. He resigned from those positions in March, 1977. Defendant Keplinger was the Manager of Toxicology at IBT. He left the company in September, 1977. Defendant Plank was Keplinger's assistant. He left the company in April, 1977. Defendant Wright formerly worked for IBT. He left the company in 1972 to begin working for Monsanto Corporation, a company which used IBT as a testing laboratory and which sponsored a substance that was the subject of an IBT study ultimately challenged by the FDA.

After the FDA initiated the investigation in 1976 and in order to assist IBT in answering the FDA's questions, the parent company of IBT, Nalco, Inc., provided lawyers to work with officials at IBT to answer the FDA's questions. Ted Mooney, the general counsel from Nalco, worked with IBT from approximately April 1976 to November 1976. In November of 1976, Mr. Mooney turned over his responsibility to Fred Current, an attorney on Mr. Mooney's staff at Nalco. Also in April of 1976, Nalco had retained Merrill Thompson of the law firm of Chadwell, Kayser, Ruggles, McGee and Hastings, Ltd. to assist IBT in answering the questions of the FDA.

In 1978, The FDA referred its investigation of IBT to the Department of Justice. A grand jury investigation ensued.

In October 1980, the government approached lawyers Thompson and Current for the purposes of obtaining information from them about their participation in the FDA investigation of IBT. The government agreed to immunize both Current and Thompson and IBT agreed to waive the company's attorney-client privilege as to any contacts the two attorneys had with IBT employees during the FDA investigation.

Both Thompson and Current received "letter" immunity. Rather than requesting that the district court enter an order under 18 U.S.C. § 6002, *et seq.*, the United States Attorney's office represented in a letter to Thompson and Current that each was being accorded use immunity from that office. By utilizing this procedure, the government by-passed the district court and the possibility that the issue of any attorney-client ramifications of Thompson's and Current's representation of IBT and its employees might be raised in those proceedings. Defendants were unaware of the granting by letter of use immunity to the two lawyers.

Pursuant to the immunity grants, Thompson and Current submitted to interviews with government agents. In those interviews they disclosed communications which they had with each defendant (with the exception of defendant Wright) concerning certain study reports, each defendant's participation in the preparation of those reports and each defendant's conduct during the FDA investigation. Subsequently, the substance of the Thompson and Current interviews was provided to the grand jury through agent testimony. Again, these events occurred without defendants' knowledge.

Under 28 U.S.C. § 1291, this Court has jurisdiction of appeals from all final decisions of the district courts. This finality requirement reflects a strong policy against piecemeal reviews. This policy is particularly important in the context of criminal actions where the delays and disruptions of interlocutory appeals are especially troublesome. *DiBella v. United States*, 369 U.S. 121, 126, 82 S.Ct. 654, 657-58, 7 L.Ed.2d 614 (1962). In this instance this appeal comes to us while the trial is in progress in the district court.

It is well settled that a defendant may not take an interlocutory appeal from an order denying a motion to suppress evidence. *E.g.*, *DiBella v. United States* at 131, 82 S.Ct. at 660; *United States v. Dorfman*, 690 F.2d 1217, 1222 (7th Cir. 1982). Defendants, however, would have us

apply the judicially created exception to the finality rule first articulated in the unique circumstances found to exist in *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918).

In *Perlman* a subpoena had been directed to a third party requesting certain exhibits for use before a grand jury. The clerk of court was in possession of the exhibits as the exhibits had been impounded at the conclusion of prior civil litigation. The defendant, who claimed ownership of the exhibits, sought to raise a claim of privilege. The Supreme Court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of defendant's claim of privilege. To have denied review would have left Perlman "powerless to avert the mischief of the order." *Id.* at 13, 38 S.Ct. at 419.

The *Perlman* exception has been applied by the courts to orders compelling testimony from lawyers whose clients as intervenors have asserted the attorney-client privilege. In *Velsicol Chemical Corporation v. Parsons*, 561 F.2d 671 (7th Cir. 1977), this Court, in reviewing a district court order overruling on the basis of waiver a client's assertion of the attorney-client privilege in a grand jury setting, held that the order was appealable, stating that the client could not protect its rights in the absence of an appeal since it could not be expected that the attorney witness would risk contempt by failing to testify in order to protect the rights of the intervenor.

The rationale for the *Perlman* exception is that "intervention and appellate review provide those holding the privilege some means of preserving confidential matters." *In re November 1979 Grand Jury, Velsicol Chemical Corporation v. United States*, 616 F.2d 1021, 1025 (7th Cir. 1980). It is the possibility of disclosure of information which is thought to be confidential that is central to the *Perlman* exception. The *Perlman* exception, therefore, permits the holder of the privilege to prevent disclosure of confidential matters.

It does not appear to us that an interlocutory appeal in the instant case would further the purposes of the *Perlman* exception to the finality rule. Defendants suggest that although there has already been disclosure before the grand jury, it is, by the very nature of the grand jury proceeding only a limited disclosure protected by the general rule of grand jury secrecy, Rule 6(e)(2), Fed.Rules of Criminal Procedure. While this position is somewhat persuasive, and we are aware that defendants were effectively denied an opportunity to contest the issue before disclosure to the grand jury because of the government's grant of letter immunity to the two attorneys, we note that the communications in question have also been disclosed to government agents. It was the agents who testified before the grand jury. A substantial breach of the claimed privilege therefore has already occurred. In the event that the present trial results in a conviction, this jurisdictional ruling on the interlocutory appeal does not foreclose raising the privilege issue again on direct appeal. It obviously would then be too late to retrieve the alleged privileged testimony from further exposure, but not too late to consider its impact, if any, upon the conviction.

We are reluctant to extend the *Perlman* exception to the particular circumstances presented by this case. Accordingly, this appeal is dismissed for lack of jurisdiction.

[11075]* PARTIAL TRANSCRIPT OF PROCEEDINGS, AUGUST 1, 1983 (ARGUMENT RE JOINT DEFENSE DOCTRINE)

[THE COURT]: Then we get down to 2 other motions here. As I said, these came apparently last night, or yesterday, or late Saturday night, something like that, and I assume that the government now has had copies of them, and these are Defendant Keplinger's motion to limit testimony of government witnesses Merrill Thompson and Fred Current, and then there is the memorandum in support of that motion, citing U.S. v. McPartlin in raising sort of the common defense limitation, which, to some extent, perhaps, is an extension of the attorney-client privilege.

Now, it seems to me this is an appropriate matter to be considered, and to some extent the government previously has responded to this in its government's answer to defendants' motion to dismiss the indictment based upon the attorney-client privilege, which the Court received back on October 12, 1982, citing certain other cases.

But it may not have been as highlighted, perhaps, as it is now, as we wind down to the end of the case, and dealing, again, with the actual testimony now of these two witnesses.

Now, I think the defense had concisely set forth its position with respect to this, and there are quotes in the McPartlin case, for example on Page 1336 of 595 F.2d, that do deal with the general area that we are at at this time. So I would ask now what the government's position is with respect to this, and specifically I would ask at this time, because we are down at the ene [sic] of the line now, for the government's [11076] indication as to what the nature of the testimony of these 2 witnesses would be and specifically whether there will be any testimony

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* Numbers in brackets refer to the Official Court Reporter's pagination of the Transcript of Proceedings.

in effect of a confession-type nature or the nature specifically implicating any of the other co-defendants.

This case to some extent is sui generis. It doesn't fit the other type areas, but I think you understand the type of testimony I am indicating.

It is one thing to say so-and-so gave me a certain document, but the question is is there anything beyond that. Are there any statements you seek to bring in by any of the defendants that might be characterized as the equivalent of either a confession or expressly implicating one of the other defendants?

MR. SPENCE: None, Judge. There was never anything that was said to Mr. Thompson that could be construed as any kind of confession. There were documents that were given to him. There were statements that are made to him about the importance of the documents. There were statements that were made to him about various positions the defendants held with respect to the validity of arguments that were being made. But there was never anything that can be construed as a confession.

THE COURT: Do you characterize those statements as being consistent with the defense that is being raised here in the trial?

[11077] MR. SPENCE: Judge, they are. And what we are going to point out is the inconsistency between those statements and documents and other statements that other witnesses make.

They may be internally inconsistent, but they are in fact part of what defense has been contending all the way along.

THE COURT: But how about Mr. Current's testimony?

MR. SPENCE: Mr. Current's testimony will be much less detailed, but in the same vein. There was never any confession of any type that was made to him, either.

THE COURT: Have you read the McPartlin case?

MR. SPENCE: Judge, I read it long ago. We just got the motion, I got it at 10:00 o'clock last might. And I have reviewed the response that we made before. And this was argued also in the Court of Appeals. And I just say—

THE COURT: Well, all right, so you read it in connection with that argument then?

MR. SPENCE: Months ago. I have not had a chance to review it yet this morning. But I, let me just summarize the government's position.

First of all, that at the time that these conversations took place between the attorneys for IBT and the defendants, there were no criminal charges that were pending either against IBT or against the defendants. That is, I think one thing that clearly distinguishes this.

THE COURT: Yes, the question whether this doctrine [11078] ought to be extended to an area such as this.

MR. SPENCE: Judge, I think that would be more than was contemplated, if you say that there was a potential for criminal charge, you are going to extend this doctrine to the point where there is some subjective determination that somebody makes about whether there is a potential out there in the woods about whether they might at some time be charged criminally. And I don't think that's what it is intended to cover. If there are charges that have been brought, if an indictment has been brought and they are working together on a joint defense, that's a different matter. But that's not what we have here.

THE COURT: Let me read the language just so that we are sure we are addressing the problem, because I know that this is the area that I believe the defense is relying on. And as has been indicated, one of the defense counsel was an attorney in this case and so—

MR. SILETS: 2 of us.

THE COURT: 2 of you were very familiar with that case and its decision. I am reading from Page 1336 now, top of the page.

> "McPartlin was entitled to the protection of the attorney-client privilege because his statements were made in confidence to an attorney for a co-defendant for a known purpose related to both defenses. They were made [11079] in connection with the project of attempting to—"

Well, this goes into details—

"—a project in which Ingram and McPartlin and their attorneys were jointly engaged for the benefit of both defendants."

Now, of course, as a sidelight, the defense analogizes that to the FDA investigation in this particular case.

"Ingram acknowledges that communications by a client to his other lawyer remain privileged with [sic] when the lawyer generally shares them with co-defendants for purposes of a common defense. The common defense rule which is not as narrow as Ingram contends has been recognized in cases spanning more than a century."

Then citing a host of cases and articles, so on.

"Uninhibited communication among joint parties and their counsel about matters of common concern is often important to the protection of their interests."

Again citing a Law Review note.

"In criminal cases, it can be necessary to a fair opportunity to defend. Therefore, waiver is not to be inferred from disclosure in confidence to a co-party's attorney for a common purpose."

Now, of course, it can be argued that is really all they are saying, that that is not our situation here. But then it goes on with additional language, again dealing with the—

[11080] "Clearly, a joint interest privilege is not limited to situations in which the positions of the parties are compatible in all respects."

And citing a code about joint defense or pooled information situation.

Now, I would say that the McPartlin case, of course, is not exactly our case, but there is language in here that is what I think the government has to address itself to:

"The common defense rule which is not as narrow as Ingram contends has been recognized in cases spanning more than a century. Uninhibited communication among joint parties and their counsel

about matters of common concern is often important to the protection of their interests."

I think, I haven't read the whole case again carefully to see if there is any more apt quote, but that seems to me to be pretty much succinctly stating the position of the defense. And I would be interested as to what the government's position is.

Again, I am mindful of the fact that that case has gone on for a long, long time and there has been an awful lot of time and money expended. I am also mindful of the fact it is a criminal case. We are concerned that all parties be afforded a fair trial here which would, of course, include all constitutional rights anybody would have.

And there is in an analogous type of situation I [11081] suppose, sort of the doctrine of necessity or the like, and I just want to be sure that it is out in the open that what we are dealing with here is exactly what would be asked of the individual witnesses that would bear on this type of situation.

Now, my own view is that this does not bar every single instance where a company seeks to investigate activities of its employees; that the investigators then can never testify and then, as the defense has previously indicated, you have the fruit of the poison tree analogy which in effect prevents ever any prosecution of civil action with respect to any investigations because the ultimate result would be you could never investigate anything, or you would be required to do it in such a way that you would never get any information as a practical matter before you knew whether there was even a problem or whether, before you knew there would be any sort of either civil action or criminal action arising out of it.

It seems to me that would so hamstring the Congress and industry and the conduct of the normal operation of business that it would be a horrible result for public policy purposes and certainly not required or intended by either the Constitution or Congressional action.

But, having said that, that still seems to me it leaves open an area where you might—well, certain evidence or testimony might legitimately be elicited; others may not.

And that's why I wonder if the government had thought this [11082] through and had any particular view as to where they thought a proper line should be drawn or whether it is their view that there is no line that needs to be drawn at all.

MR. SPENCE: Judge, it is our view that there is no line that needs to be drawn at all. And, one, because of what you said as far as the limiting on any investigation that would be possible if the rule were to be extended to that degree; and also because in this case, the interests of IBT and the defendants were not common. They were in fact adverse.

And I think you heard the testimony before about how the company is really advocating an investigation and disclosure and in fact what the defendants are advocating is a nondisclosure and attempt to conceal. So, their interests are adverse. Mr. Thompson is going to testify they are adverse.

THE COURT: Is that your position, because you certainly never indicated that to any of the defendants at the time the investigation began.

MR. SPENCE: Well, that is certainly the effect of what was going on.

THE COURT: If it is your position that they thought there was a common interest of providing the FDA with the truth—

MR. SPENCE: Well, it is our position, Judge, that was not the interest of the defendants; that they were attempting in fact to conceal what the truth was. And Merrill Thompson, that's going to be—

[11083] THE COURT: I think you should carefully articulate exactly what your position is, because I don't know if it will ever get to that point, but if the 7th Circuit is ever reviewing this case, I know this is going to be a matter of great importance to them.

MR. SPENCE: Well, let me also—

THE COURT: And you have a discretion, obviously, on how you conduct your case, what your trial techniques are. And I am well aware of various considerations that do pass a prosecutor's mind in determining whether it

should be brought up. But I do think because of the tremendous investment that everybody's had in this case, that no one should inadvertently blunder into what they are doing here without having fully considered the consequences.

MR. SPENCE: Judge, let me also say that another point that distinguishes is that there was no confidentiality involved in these communications; that most of the communication is in large groups and, as you have heard, Merrill Thompson was the attorney for the company and not the attorney for the individuals.

THE COURT: That, I think, is a point that I have not clearly articulated in anything that I have said, but it is one that I do think bears further development. As I—well, let me ask it this way: Is there to be any testimony adduced by either of these individuals now that would be akin to somebody [11084] relating something to them in confidence in order to assist a preparation of something else to be revealed to the FDA? In other words, the statement made was not intended and it would have been obvious it was intended to the contrary, not to be revealed to the government or the FDA. In other words, if it was truly a statement in confidence as opposed to eliciting information to be transmitted to the FDA so that it was the antithesis of being in confidence.

[11085] Is there to be any testimony adduced of the former nature?

MR. SPENCE: Judge, there were many discussions in groups and between Merrill Thompson and individuals, where matters were discussed about [sic] could and could not be disclosed to the FDA.

Things that were—well, there are documents, for instance, that are stamped—

THE COURT: You mean matters were disclosed that could or could not be?

MR. SPENCE: That were part of the discussion.

THE COURT: Or was there a general principle as to the situation, as opposed to dealing with specific matters?

MR. SPENCE: The discussions were about what would we disclose to the FDA.

THE COURT: Beforehand?

MR. SPENCE: Beforehand. Whether there were things—can we say this? Is this true?

There is this constant probing about what would happen if we disclosed this to the FDA, what happens if we don't say this, and, as the drafting of the responses took place, there were countless meetings that went on for hours about [sic] could or could not be disclosed. And there were documents—

THE COURT: Is this to be adduced by your testimony?

MR. SPENCE: Yes.

[11086] THE COURT: Or is this just the background you are indicating?

MR. SPENCE: No. That is part of the testimony, that there were these conversations that took place over many, many weeks, daily meetings, where things of that nature were discussed.

And, of course, those are mattters that are being discussed with the company lawyer. They are matters that are part of the evolutionary process of what was, what ended up as being additional false statements and additional matters that were part of the cover-up of the truth.

So to that extent, where they are in meetings with groups, they are not things that are said in the confidentiality of an attorney-client relationship. They are not told to their attorney. They are told to the corporate attorney.

And, furthermore, many of them are acts in furtherance of the schemes, because they are statements that are made that indicate that there is an ongoing and continuing attempt not to disclose the truth.

So those are matters that are the proper subjects of direct examination in the Government's case, to show that there was, in fact, a fraud that was being perpetrated.

THE COURT: Will all of this testimony relate to conversations where others were present, or will some of them be a one-on-one?

[11087] MR. SPENCE: Some will be one-on-one, Judge.

THE COURT: What would be the nature of the testimony?

MR. SPENCE: Well, there are a number of meetings where Merrill Thompson meets, individually, with Dr. Keplinger and Dr.—I don't believe there are any where we are going to be one-on-one with Jim Plank, but Dr. Keplinger had meetings throughout the time.

THE COURT: Will any of Thompson's testimony relate to conversations after December 14th, or whatever it was, of 1976?

MR. SPENCE: Yes, Judge. There will be some conversations that take place up to the time when Dr. Keplinger resigns from the Board, resigns as President of IBT.

THE COURT: But the gist of all this will be—will their statements be consistent with the statements I hear and the position here, that what they have said consistently throughout is the truth and that you are putting a wrong interpretation on it?

MR. SPENCE: I am sure that is what their position will be, Judge.

THE COURT: There isn't anything different from what they are stating now.

MR. SPENCE: There are inconsistencies that develop during the evolution of the disclosures or the non-disclosures, [11088] where there are things that are inconsistent with what we expect will be their present position. Those we think are legitimate prior inconsistent statements that we can bring out.

THE COURT: So your answer, then, to the two quotes I have given, especially the uninhibited communications among joint parties and their counsel, about matters of common concern, often being important to the protection of their interests—is it your argument that because all of the conversations were in the context that this was going to be revealed to the FDA, that therefore negatives the confidentiality aspect that was involved, for example, in the McPartlin case? Is that what you are saying?

MR. SPENCE: Judge, I don't know if it can be stated quite that definitely.

THE COURT: How do you get around the language of the McPartlin case? How do you meet that language? You can't say that isn't the law, because this is a Seventh Cir-

cuit decision. What is the Government's position as to how you deal with those quotes?

Do you want to take a couple of minutes otherwise?

MR. LASSAR: I don't think we need to.

(Brief interruption)

THE COURT: All right. I should add one other quote to address yourself to here, that I have marked but [11089] neglected to cover. This is again on page 1336 of the McPartlin case. I will just read the main part of the paragraph.

> ". . . argument is that the co-defendants' defenses must be in all respects compatible if the joint defense privilege is to be applicable. The cases did not establish such a limitation, and there is no reason to impose it."

Here is the critical language:

> "Rule 503(b)(3) of the proposed Federal Rules of Evidence . . ."

We know that didn't go through.

> ". . . as approved by the Supreme Court, stated that the privilege applies to communications by a client 'to a lawyer representing another in a matter of common interest'."

Then it mentions Weinstein on Evidence, the 1977 edition, and then they go on.

The argument is that under our existing rule that the privilege applies to communications by the client to a lawyer representing another in a matter of common interest.

With that, I would ask what the Government's position is for the record, recognizing you have not had an opportunity to file a written response.

MR. LASSAR: Judge, one important point to make is that [11090] this is not a joint defense situation. In a joint defense situation, you have two or more subjects of an investigation, if there hasn't been an indictment, who are seeking legal advice from the same attorney, of the same group of attorneys.

Here in this situation there is one subject of an investigation, the corporation IBT. The individuals are not subjects. No accusation has been made against them. No one is investigating those individuals.

THE COURT: Although there was the so-called, and I use the term loosely, Miranda warning made at the time some of the individuals were speaking with the FDA. In Washington.

MR. LASSAR: Well, I think, Judge, as evidence shows, given the fact that none of the defendants ever discussed that with the attorneys, that was of no significance. It was made by a scientist, who, you know,—I don't know for what reason he said that, but it had no impact on the defendants, since they never discussed it with the attorneys.

[11091] THE COURT: It turned out to be prophetic, however.

MR. LASSAR: Yes, it did.

The defendants never seek any legal advice from the attorneys relating to the investigation. They don't go to the attorneys representing the corporation and seek any advice and ask them about any problems or any concerns they have. There is no joint defense.

The attorney is attempting to defend the corporation. The defendants are attempting to further the concealment of what is going on and proceed to lie to the attorneys about what happens and prevent him from disclosing information to the FDA.

But there is no joint defense here. They are not going to the attorney for someone else who is also the subject of an investigation and seeking legal advice from them. None of the defense ever sought legal advice from any of the attorneys, from either attorney, and that is admitted in the pretrial hearing and in the testimony.

The government has proven at this point in the trial without a doubt the crime and fraud exception to the attorney-client privilege. The evidence has shown that submissions were made to the FDA to defend the naprosyn report and the TCC report. The evidence has shown those submissions were false, that each of the defendants knew that they were false, and the attorneys worked on those submissions with the defendants and submitted them to the FDA.

[11092] Now, that exception to the attorney-client privilege completely visciates any attempt to use that privilege, anyway.

THE COURT: So your position here, and I am not that familiar now with the facts in the McPartlin case, is that they in effect were using the attorneys as part of their attempt to cover up their prior wrongful activity, so that it was a continuation of the criminal acts in their dealings with the attorney, as opposed to seeking legitimately to defend themselves by counseling with an attorney who they thought represented them.

MR. LASSAR: Exactly.

THE COURT: Is that a fair summarization—

MR. LASSAR: Yes, And that is going to be the whole gist of Merrill Thompson's testimony, that he was used exactly in that way. He was lied to. They hid information from him.

THE COURT: I am going to let the defense reply, so I am sure I wholly understand all the arguments. But is there anything else you wish to add now?

MR. LASSAR: No, Judge.

THE COURT: Mr. Decker, on behalf of the defense? And again, while I indicated that this was filed on behalf of Dr. Keplinger, the rules by which we are trying this case are that the motion of one is the motion of all, unless somebody excludes themselves, so you are speaking on behalf of everyone.

MR. DECKER: You have heard Mr. Lassar. He said the defendants had not talked to Merrill Thompson or Fred Current [11093] about criminal liability.

On the contrary, Merrill Thompson said repeatedly in his testimony earlier here that there were discussions with the defendants about criminal liability, and, just to quote from Page 544, in response to a question, which was:

> "Q. Did they, Dr. Calandra or Mr. Plank, after that meeting say anything to you about any criminal ramifications discussed at that meeting?
>
> "A. I don't recall that. As I said, frequently in our meetings we talked about the criminal ramifications were always in the background. The importance of

accuracy was always emphasized. That is the context in which any reference to criminal ramifications would be raised."

I could say on a dozen occasions in his testimony he admitted that 1001 was discussed with the defendants, and that there were discussions of criminal ramifications, both to the individuals and to the corporation.

As I recall, the testimony was in August that Merrill Thompson—in September—commissioned a memo on the applicability of 1001, and he discussed that with the defendants.

Now, both Mr. Lassar and Mr. Spence have put forward the claim that if one of the defendants was talking about an illegal matter or was presenting inconsistent statements to one of his co-targets or to the lawyer for a co-target, that somehow visciates [sic] the common defense doctrine.

[11094] I think, your Honor, McPartlin is really the direct answer to that, and we are a little limited in that regard, because, as your Honor sees from the opinion, there was a seal order there. But I think before that seal order was entered, there was certainly some scuttlebutt, and I don't know if Mr. Silets heard it, but I did, and I have no hesitation about inviting your Honor to call Judge Grady about it, because I think it is still under seal, but the scuttlebutt was, your Honor, that Mr. McPartlin discussed with an investigator for one of the Ingrams criminal practices of his, that is, McPartlin's, and the Ingrams, who were defendants in the case, sought to use what Mr. McPartlin said, because in part the Ingrams were defending on the theory that they had been extorted by public officials in the Chicago area.

So they wanted very much to get before the jury the fact that a defendant had talked about some illegal practices among public officials in Chicago.

What Mr. McPartlin said to the Ingram investigator certainly was not intended to forward Mr. McPartlin's defense. It was just a general discussion about the background, the same kind of thing we have in our case.

Now, your Honor expressed a concern, which I think was a legitimate one, but which really, upon analysis, I don't think affects McPartlin in the slightest, when your Honor said that if the common defense doctrine is to be applied to [11095] discussions between corporate counsel and executives, then how in the world would a corporation ever investigate allegations of misconduct?

The answer to that, I think, is the way they do it right now, whenever there is an allegation of misconduct by officers. The corporate attorneys go down there with warning forms and with release forms and explain to the officers that there is a possible criminal or civil investigation, and that they, the lawyers, represent the corporation, not the individuals, but that the individuals are free to speak to the lawyers or not as they choose, and that if they do speak to the lawyers, there well may be disclosure of what they say.

[11096] That's the way those investigations have gone.

THE COURT: But don't we have the situation that is before that, though? We don't have, as I understand it in this case, at the time there was [sic] no allegations of misconduct; the FDA was just trying to find out answers to various questions. It was before you ever got to any allegations of misconduct.

MR. DECKER: Right from the minute FDA hit IBT in April, there are allegations of misconduct and saber-rattling, which led everyone involved in the matter to see the criminal potential. I don't think there was a moment, your Honor, when anyone regarded this as merely a routine matter.

FDA, in fact, in July,—

MR. KULWIN: Judge, the first meeting with Merrill Thompson and the defendants on July 8, 1976, indicates that he advised them of criminal liability. I mean that was all thrashed out in our pretrial hearing. And that was Merrill Thompson's first meeting with these people. And that was right after the inspection. And indeed, the FDA advised these people that, due to the way they were turning over the records, they were strongly suspicious and FDA was making serious allegations from Day 1, from the very first day.

THE COURT: I do recall the testimony, but it was only a general abstract principle back in July of '76. No one was being accused. And as I understand the testimony, at that point nobody, they really felt that they were going to be able [11097] to come up with all the information that had been requested. So, I don't think there was any realization at that point that somebody had done something wrong. I think it was quite the contrary. At least as far as the lawyer for the company was concerned or the management.

MR. KULWIN: That really isn't the issue. The issue is: Was there criminal liability at that point in time? Was it a potentiality? And it was. And I will address it, I will let Mr. Decker finish.

THE COURT: Yes, and I didn't mean to interrupt your argument. I just—

MR. DECKER: The cases we cite, your Honor, Hunydee and Continental Oil, in the footnote at page 2, address the proposition that there need not be an indictment in order for the common defense doctrine to come into play.

But as I understand the Government now, it asserts three reasons why the doctrine isn't applicable here: One mentioned by Mr. Spence in response to your Honor's concern was that we shouldn't limit corporate investigation.

And, secondly, Mr. Spence said the interests of the corporation and its officers were diverse. Well, interests are often diverse in investigations among particular defendants. And in our memorandum, I think we discussed the leading case, Hunydee, in which that particular question is addressed.

But the matter of diverse interests is also a very [11098] delicate one because there would be no such thing, your Honor, as confidentiality among co-targets or co-defendants if all one had to do to dispell confidentiality was to stand up and point to some adverse issue, some adversity between the various defendants, because typically that kind of adversity exists, and it would be particularly, I think, a blow to the confidentiality principle if you were to allow one side to stand up and say there is adversity because Dr. Calandra was giving us inconsistent statements; therefore, he wasn't helping the corporation.

If Dr. Calandra were here or if Dr. Keplinger were testifying, he would say, "Wait a minute. We had the corporation's interests properly in mind. Merrill Thompson didn't."

So you get into a contest between various parties. If the confidentiality doctrine disappears because of that, it really doesn't exist.

Thirdly, the Government has told us there was no confidential relationship between Merrill Thompson, Fred Current on the one hand and the officers. But the testimony of both those lawyers was clearly to the contrary. Merrill Thompson testified that after he extended his investigation to people who were not in the core group, he cautioned them about the fact that what they said was not confidential. That's at page 537 and earlier in the transcript as well.

But in talking about Drs. Calandra and Keplinger, [11099] he never told them that what they told him was not to remain confidential. There is not a suggestion that confidentiality didn't apply as it does whenever common targets are involved.

And Merrill Thompson—

THE COURT: May I just—I am going to let the Government, give them an opportunity to reply, so I am just going to interject here that there was other testimony by him indicating that they knew right from the beginning that all of this information was going to be disclosed to the FDA, so that was part of his statement. They never considered anything to be in confidence.

MR. DECKER: That was not the testimony of Merrill Thompson, nor could it be. To the contrary, this was, as Mr. Spence told you, the discussions concerned what wouldn't be turned over to the FDA as well as what would be. And then Merrill Thompson's notes, which were in evidence before and which we have here, and he will be testifying about, very important, a very important point to him was to get together with the Syntex lawyers and find out what they weren't going to tell the FDA so that Syntex and IBT didn't wind up taking inconsistent positions.

I don't think, your Honor, this was any different than any investigation.

THE COURT: But that's contrary to what I am referring to and what I think you really are referring to; that is, any [11100] statement made between any of the defendants and Merrill Thompson to remain in confidence between them. That was never the situation. And we have got a transcript so we don't have to argue about what was in the transcript. But it seems to me he was clear that was never, in his understanding, it was never the situation.

MR. DECKER: That's what the doctrine, your Honor, is intended to accomplish. Parties who are targets to a matter in litigation are not in litigation—are not aware of these fine points, but it is the law which says that matters which are said between targets and representative [sic] of targets is to remain confidential. I don't think for a minute that the confidence doctrine would have permitted Merrill Thompson on behalf of IBT to have drafted a letter which said, "IBT's president, Dr. Calandra, made inconsistent statements to me." If Dr. Calandra had made inconsistent statements, the joint defense doctrine would have prohibited Merrill Thompson from telling the FDA that.

And, of course, we are in the same situation here in the course of the trial.

THE COURT: All right. Anything further?

MR. DECKER: Let's see, your Honor. Just one thing here.

We have pointed out, your Honor, that in August, the FDA wrote to Syntex and this communique was later forwarded to [11101] IBT, Government Exhibit VI-D-4. And in that letter, the FDA says that the naprosyn application contains an untrue statement of a material fact, according to the FDA.

And then in Exhibit XI-D-5, dated September 29, 1976, a letter to Dr. Calandra, the allegation is made that Dr. Calandra's reports may contain inaccurate and false data.

So, very early in the game I think everyone knew what the stakes were here.

[11102] THE COURT: All right, Mr. Kulwin.

MR. KULWIN: Judge, I just have a very few brief comments.

I think that the difference, one of the differences between the trial and the pretrial hearing is that we had a lot of evidence on what the FDA's position was early on. I think Mr. Stelter's memorandums of report, which are Exhibits IV-E-1, -2 and -3 indicate that there's accusations in the FDA's mind that are being communicated to these people at IBT, statements of gross inconsistencies between raw data and study reports, omissions of records that are unable to be found. Indeed, I believe in one of the reports, Mr. Stelter confronts Mr. Plank directly and asks him about the validity of the study, the naprosyn study, and goes through the reasons why he doesn't believe that it is valid.

So, I think that you have, accusations are being made at that point in time.

Enter Merrill Thompson to resolve the legal problems as to what records can be turned over. I think if you recall from the pretrial hearing, that's how he first got in, as to what could be turned over, what couldn't be turned over, giving the client's approval or disapproval.

Then comes July and Thompson, of course, talks about criminal liability and you have these people and the whole issue of whether they looked upon him as a lawyer. But assuming [11103] arguendo there is no attorney-client privilege, you do have, Thompson is at board meetings with Calandra and the IBT board talking to the corporation and Calandra about what should be done, how this should be approached, what should be investigated, what can be disclosed, what our position is, how we should present it to the client.

And so I do believe that Mr. Decker is accurate when he says the common defense doctrine applies; therefore, I think the Court makes an apt inquiry to Mr. Spence when he says, "Do you plan on eliciting anything of a criminal, incriminating nature, not confessions, but admissions, perhaps." And I think we had a preview of the gratuitous testimony we are going to get from Merrill

Thompson when in the pretrial hearing he said that Mr. Plank said to him before going to Syntex in California, "Well, Mr. Thompson, I will say whatever you want me to say." I mean that's the kind of testimony that is going to be elicited here, which I, you know, I think you can put an evil inference on this, the way Mr. Thompson delivers it and the way he chooses to recall.

But I think instead, all that reflects is Mr. Plank's stating to Mr. Thompson, "Look, I am looking to you for advice on what I can say to these people, what I can't say to them, what's confidential among us and people at IBT and what's not." And it is precisely these type [sic] of statements that you are going to see sprinkled throughout. [11104] So when Mr. Spence says that there are no confessions being made by the defendants that are going to come out in Mr. Thompson's testimony, I think he is accurate. I don't think anybody went to Mr. Thompson and said, "I am guilty of a crime," but I think they made numerous statements which they believed were going to be either held in confidence by their attorney or, assuming arguendo if he is not their attorney, by the corporate attorney who, for all intents and purposes, went on the same side as them, and they were statements in the effect of, "What can I say, what can't I say, what is confidential, what is not confidential," which will now be put on the stand, and evil inference is going to be put on all of this.

And I mean it is as though the government is sitting in on attorneys preparing witnesses for depositions, preparing their clients to be deposed, preparing their clients to take the stand. It is incursive, it is obnoxious, and I don't think it should be allowed here.

[11105] MR. SILETS: Just one comment, your Honor. I want to reflect on what Mr. Decker said with respect to the McPartlin case. I was one of the trial attorneys and one of the attorneys arguing the appeal. I was privileged to see the contents of a matter which is under seal. It is under seal and, consequently, I cannot disclose it. But I do not take any exception to anything he said.

THE COURT: Yes, Mr. Robertson?

MR. ROBERTSON: About 3 sentences, your Honor.

I would observe that the government's apparent insistence on adducing the testimony of those witnesses may seem to betray the weakness they think their own case has, especially in view of the 7th Circuit's concern about, and this Court's concern about that testimony. In any event, it is a blatant attempt to portray this alleged conspiracy in a particularly venal light.

We join the arguments of the other defendants; but in view of the separate and quite different situation of Dr. Wright with respect to these two witnesses, we also ask for a limiting instruction making all of this testimony expressly inapplicable to Dr. Wright; or, in the alternative, we renew our motion often made for a severance.

THE COURT: I would ask the government is there any area of testimony by the lawyers now that could be characterized as 403 type of testimony? In the government's view.

[11106] MR. SPENCE: No, Judge. We have cautioned Mr. Thompson not to be discussing any of the other studies. I mean obviously it is lurking out there all around the testimony, but we have been very careful in preparing the direct and have advised him not to be discussing any study—

THE COURT: That's the motion in limine type of testimony, but I am talking about the 403, where it would be characterized as being unfairly prejudicial by virtue of a statement being made.

MR. SPENCE: None that I can think of, Judge.

THE COURT: I have to say that, I used the phrase the other day in another context about whether something was cricket or not, in a way that may be a way to sum up the whole point that we are dealing with here, whether this goes beyond the customary rules such as are in effect enchimed in our due process or constitutional rights.

Does the government have any other cases or any other support for what they are seeking to do other than what they included in their brief?

MR. SPENCE: Nothing more, Judge. As I said, we received it for the first time about 10:00 o'clock last night.

THE COURT: All right. I am going to take a short recess at this time. I think it is important that everybody know essentially what we are going to be doing here. I take it the very first witness is going to be a very brief witness, so [11107] it isn't going to take very long. We aren't going to have any midmorning break. I would ask the marshal to notify the jury that we should be starting up in about 15 minutes. We are sorry for the delay.

Let's take a short recess at this time and we will plan to go right through then until 12:30.

[11108] MR. SPENCE: Judge, let me just mention a couple of matters with respect to Mr. Thompson, depending upon, of course, what the Judge's ruling is.

But over the weekend when we were working with Mr. Thompson, he made up a chronological list of important events, including meetings. And he took this from his diaries, as I understand. And he has, it is a number of pages, there were 75 or more meetings that he had during this period of time. We are going to be eliciting testimony from some of those meetings.

And I would ask that we mark this as an exhibit and then allow Mr. Thompson to refer to this as necessary to refresh his recollection. I have given copies to the defense. They have all of it. And they also have all of the details, in more details from the diaries and from the notes themselves.

But I think that it would save an awful lot of time if Mr. Thompson could have this, and he doesn't have anything that he is going to testify about, he can put this aside, but at least it will help him to be able to determine what meeting it was and the like.

Then also, Judge, you recall that we turned over all of his notes a second time, actually, last week. And we have put them together in a proper order and I would ask that Mr. Thompson be allowed to have, as you have throughout with your exhibits, a box next to him which has all of his notes so that [11109] if he is asked about a particular meeting, he can use those notes to refresh his recollec-

tion. He can then put them aside and testify about what it is that he recalls. Or if he doesn't recall anything, we can have them marked as past recollection recorded. But I think it would speed up the whole thing if we could have all of this outlined and approved in advance so that we don't have unnecessary objections.

THE COURT: Any objections?

MR. SILETS: Yes. I do object to this procedure. And there are two requests that Mr. Spence has made. One is that this packet of materials which Mr. Thompson put together this weekend in conjunction with the prosecutors and which we were handed at the beginning of the proceedings this morning, which I suspect is around 20 pages, should be used by him as a crib sheet during his testimony. I think that Mr. Thompson is no different than any other witness, and that we have gone through many procedures in this case where people had their recollections refreshed. And I think it is important that the jury understand that, if he has something to say, that he either has a recollection or he doesn't, and that they should see from his demeanor his methodology of testimony as any other witness.

I think this also illustrates the problem that we raised with you at the outset of the case; namely, the interaction between the prosecutors and witnesses and the circumstances [11110] of their preparing witnesses. And why it is necessary for us to see the prosecutors' notes, because they may contain substantially verbatim statements of these witnesses.

Secondly, with respect to the box of materials, that is the same kind of a situation; we were given a box of materials, no one told us what order those materials should be in or the order in which this witness intends to testify about those materials.

If he has a faulty recollection, they know full well what the process is. Rather than having this witness rummage through a box of materials which may have pejorative effect by itself upon this jury, that he, Mr. Thompson, had spent so much time with these defendants that he had a whole transfer case full of notes concerning the things

that went on with them; I think that has got to leave an impact on this jury which is the intention of the prosecutors, to leave the impact that he was so intimately involved and proceeded to deal with them so closely, that they had a transfer case full of memoranda in his own writing as to what they had said.

I think that he should be dealt with just as any other witness, and any other witness never had that privilege that they seek to afford him.

THE COURT: I am not clear what you are saying. You want to deprive him of the right that every other witness has had to refresh his recollection?

[11111] MR. SILETS: Not at all.

THE COURT: What are you saying?

MR. SILETS: I am saying that if he has a faulty recollection, let them show him something just as any other witness has been shown a document and asked that it be refreshed. But not to sit up there with a crib sheet.

THE COURT: Well, we have had exhibits here that have been used throughout the trial to refresh people's recollection. You are saying now that we have to keep them in a far portion of the courtroom and run back and forth?

MR. SILETS: I am saying that if they have an exhibit and we don't know at any moment in time what it is he will fail to recall, but I think that it is not appropriate for him to sit up there with a script which they, together with the witness, prepared over this weekend and use that as a vehicle for his testimony.

THE COURT: If you are talking about reading from the script, I think that's a legitimate objection. You ought to seek to exhaust his recollection before he would rely on anything else. But the mechanics of making the prosecutor trot back and forth over and over and over again with pages of notes it seems to me is really not an appropriate objection and I will overrule that. I will permit a box of the notes to be made available just as we have done, permitted exhibits to be made available to all the other witnesses in this case. [11112] And we certainly do the same, if we do get to that, for any defense witness.

MR. KULWIN: Judge, the only point we want to make—

THE COURT: But I will require that they have to exhaust the witness' recollection before you can refer to anything else to try to refresh his recollection, and you are not going to have him read from any outline, as though it were a prepared statement by the witness, and it does highlight the fact that we do want this testimony elicited, depending on how much I am going to permit, by question and answer form, as opposed to any narrative.

MR. KULWIN: As long as he indicates, when he can't recall, that he has to go to refer to his notes. That goes to the question of credibility and—

THE COURT: I agree with you, and that is the sense of my ruling.

With that, we are going to take approximately a 15-minute recess at this time. We will so notify the jury, and I will come out and give a brief ruling, and we will proceed with the trial.

(Recess, 10:55 a.m. until 11:20 a.m.)

THE COURT: Do we have everybody in? All right.

I have had an opportunity now to hurriedly review, again, the cases and the materials that have been prepared on the motion of defendants to limit testimony of Government [11113] witnesses Merrill Thompson and Fred Current.

It is the Court's view that there are two considerations here. In addition to the basic point, as raised in the McPartlin case, there is the 403 consideration

Now, with respect to the McPartlin situation, it is the Court's view that we just don't have that situation in this case. We do not have a joint or a common defense. We are not dealing with a revelation of some confidential information as part of the joint or common defense.

We are dealing in the Government's—at least it is the Government's view that we are dealing with information concerning an alleged cover-up, which is part of the indictment.

So since we do not have a joint defense, we do not have reliance [sic] any attorney-client relationship or reliance on

common defenders against a charge, and we don't have the situation or public policy concerns as expressed by the Seventh Circuit in the McPartlin case. We don't have the defendants being placed at a disadvantage by reason of a justifiable reliance on such a situation.

In effect, we don't have the defendants believing that they have the attorney for the company seeking to help them work their way out of a situation that they found themselves in.

I indicated previously I did believe the testimony [11114] of the attorneys that they never indicated that they were seeking to do anything other than to further the position of IBT vis-a-vis the FDA inquiry by telling the Government the truth, albeit in a light as favorable as possible to IBT, and I believe the witnesses previously when they testified they made it clear to everyone they were talking to that they were concerned with the truth and that this was going to be a response to the Government, and all of the other admonitions were always in the context of the company's truthful, of course, as favorable as possible, response to the various FDA inquiries.

I am not really articulating all of it, and I will try in writing to better articulate my reasons for it.

I do want to indicate that I think that this is close to a situation which would create a real problem for me, but I don't feel that we have the situation and that we don't have, in fairness to the defendants, a situation which would in any way prevent the defendants from receiving a fair trial as a result of this situation.

But, having said that, I still believe that we do have the doctrine of Rule 403. That is a legitimate doctrine. And I have indicated before I would seek to utilize that where appropriate and I would say, for example, I would bar the Government having either Mr. Thompson or Mr. Current testify as to the statement by Mr. Plank that he said, in advance of [11115] a conference, words to the effect that, "I will tell them whatever you want me to say."

That, to me, is something I have had clients say over and over again with not the slightest hint of an impropriety being involved. I think a statement of that nature could

lead to wrong conclusions. Admittedly, we are in a situation where the Government has alleged a cover-up, but to piece together a number of statements that normally would be considered to be completely innocent in the context in which it was made, and seek to tie all these somehow together to show a sinister purpose for an individual statement of that nature, it seems to me that is unfair prejudice, as opposed to any relevance with respect to the proof of the Government's case, and I would find that at least that particular statement, using the balancing test of Rule 403, is one that should not be testified to before the jury and would grant the defendants' motion in limine with respect to the same.

Now, I don't know if there are any other statements of that nature that in the normal course of events, that of attorneys talking to clients, would be considered normally to be completely innocent. It seems to me that this case should not be presented by seeking to give some sinister aspect to what otherwise are normal type statements that are made between individuals and attorneys.

If there is anything else of that similar nature, [11116] I would similarly bar it, and I would ask that the Government so caution each of their witnesses to avoid any such statements, and certainly to protect themselves by not asking any questions on direct that might elicit any such testimony.

Of necessity, that is kind of general, because there is no way of knowing at this stage exactly what any of the witnesses is going to testify to, but obviously if I find on objection of the defense that the Government has gone beyond that, I would act promptly right before the jury and grant a motion to strike such testimony and forcefully urge to the jury that they should disregard not only the testimony, but not seek to draw any unfavorable inferences of any kind therefrom.

All right. That is where I come out on this. I just don't think the joint defense doctrine is involved in this case. We don't have this situation. Obviously, depending upon what ultimately happens to the case, the Government will

have the benefit of 20/20 hindsight reviewing the transcript, but that is the way I view it at this time.

That is my ruling.

Let's bring out the jury at this time and conclude with the one witness. I will have to break at 12:30. I have a Judge's luncheon. Then we will resume again at 2:00.

MR. SILETS: In light of your comments, your Honor, do you think it appropriate, if the Government has any such [11117] similar statements, that they think might be elicited or inadvertently stated, that they proffer them to you now?

THE COURT: If they wish to proffer them. Otherwise, I wish to have them not brought forward at all.

MR. SPENCE: Judge, I can't think of any.

THE COURT: I really feel strongly about that. I can see the sinister connotation. I have had that said to me, and I am sure everyone who is a lawyer has had it said to him, and there is not the slightest hint that there is anything sinister about such a statement. I don't think the defendants in a case of this nature should have such statements in the record.

* * *

(SUMMARY OF SELECTED TESTIMONY OF MERRILL THOMPSON AND FRED CURRENT AND COMMENTARY THEREON)

1. Merrill Thompson testified that at a meeting on September 16, 1976, a defendant, Dr. Calandra, said that audits of certain types of studies were being initiated by senior management employees. Calandra did not say that an audit had been done by three other persons in the spring of 1976. Tr. 11140-44.

The seeming purpose of this testimony was to suggest that Dr. Calandra deliberately withheld significant information, the earlier audit. But, as Thompson later testified, he received copies of the April 1976 audit on March 18, 1977 from Fred Current. Tr. 11361. The record contains no evidence that Calandra or anyone else deliberately withheld them from Thompson.

2. At a meeting on November 1, 1976, Dr. Calandra told Thompson that the 250 animals added to the TCC study were to serve as insurance against a relatively new National Cancer Institute requirement for studies of that type. Earlier, Thompson had heard different explanations for the animals. Tr. 11210-11.

Whether that was Dr. Calandra's conception of the utility of the 250 animals was not the subject of proof by the government. Evidently, though the purpose was not achieved, the testimony was offered to suggest that Dr. Calandra lied.

3. On November 4, 1976, Thompson testified, he spoke with the defendant Keplinger. Asked whether Keplinger said that data from the extra animals had been used in the final TCC report, Thompson said he had no recollection that he did. Tr. 11213-14.

The testimony evidently was offered to suggest that Dr. Keplinger was aware of such a use of data and should have disclosed it, but did not.

4. Thompson testified that he had asked for a list of all IBT studies done for Monsanto which related in any way to TCC, but he did not learn until December of the Ribelin report. Tr. 11276-77.

There was no evidence that any defendant concealed this report. Moreover, Thompson learned of the report from Dr. Gordon, an IBT employee. Gordon told Thompson he had received Dr. Ribelin's report on the condition that it be kept confidential, and it was not until late 1976 that he told anyone at IBT about it. Tr. 11481-83.

5. On December 11 or 12, 1976, preparing for a meeting with FDA representatives as to the TCC study, Thompson raised the question whether an early draft of the TCC study should be communicated to the FDA with IBT's response. Dr. Calandra objected to forwarding the draft and no sentiment for including it was voiced by the defendants Keplinger and Plank. Thompson insisted, and the draft was forwarded. Tr. 11267-69.

6. Thompson testified that he was to have attended a meeting with Dr. Calandra and FDA representatives on December 14, 1976, in Washington. However, Thompson told Calandra he could not attend the meeting because he would "likely feel" he would have to make statements contrary to Calandra's. Tr. 11277-78.

In fact, nothing Calandra said at the meeting disagreed with Thompson's views. Calandra Hrg. Ex. 9 of 3/24/83; Def. Ex. 469.

7. A written submission was to be given to the FDA at the Washington meeting. While Thompson did not attend the meeting, he testified that he traveled to Washington with Dr. Calandra to make sure the written submission was not changed without his knowledge. Tr. 11290-91.

8. At times, when Thompson or Current asked questions about the TCC or Naprosyn studies during meetings with the defendants Drs. Kinoshita and Kennedy, they would leave the room for minutes. When they returned, it was with an answer to a pending question. Tr. 11298.

The implication of this evidence, of course, was that something sneaky was going on. But this very procedure was one Thompson and Mooney employed when they presumably preferred to speak out of the presence of the defendants. See Tr. 659.

9. Thompson testified that his relationship with Drs. Calandra and Keplinger started deteriorating in mid-November of 1976 and was strained in December. This change in the relationship, he said, was attributable to his belated discovery of the Ribelin report and the first version of the TCC report. Tr. 11304-05.

Thompson, Current, and IBT officials did not begin intensive work with the TCC documents until late November, after Thanksgiving. Tr. 11666. Gordon, not Calandra, had the Ribelin report. Tr. 11481-83.

Thompson did not testify, as did Current, to his knowledge that Dr. Calandra regarded Thompson as an inadequate lawyer and wished to fire him. Tr. 11680.

10. Thompson recited a conversation he said he had with Dr. Calandra on February 7, 1977. Calandra allegedly quoted the defendant Wright as saying in regard to the missing blood and urine data from the Naprosyn study, "that that problem was beyond our control, there was nothing we could do." Tr. 11311-12.

There was nothing sinister or relevant about Wright's statement. By that time it was obvious the data would not be located.

11. Thompson testified that he wanted to talk with the defendant Plank in February of 1977, but Plank was not available for a conference until February 24th. Tr. 11326.

The implication sought to be drawn, apparently, was that Plank avoided Thompson. But this episode occurred months after the FDA had received the IBT reports that formed the basis for the indictment. And it was uncontested that improper actions by Thompson and Current in February led Dr. Calandra to order that association

with the lawyers cease until he returned to Illinois a short time later.

12. On February 14, 1977, Thompson met with the defendant Keplinger, who said Dr. Calandra had instructed Keplinger not to give some audit reports and notes to Thompson. Tr. 11315-17.

See par. 11 above.

13. On February 15, 1977, Dr. Keplinger said that the defendant Wright had not been given a deadline for responding in writing to questions about the Naprosyn study. This was different information than Thompson had received from Dr. Calandra earlier. Tr. 11323-25.

14. Without specification of any sort, Thompson said he felt he had not been given documents he had requested, or satisfactory answers to questions he posed, and had been denied access to persons. Tr. 11550.

See par. 11 above.

15. Thompson testified that Dr. Keplinger twice refused to give him notes containing information about the defendant Wright's knowledge of the Naprosyn study. Though he had asked that counsel be present when contacts by Drs. Calandra or Keplinger were made with Dr. Wright, five such conversations occurred without Thompson's knowledge. Tr. 11554-55.

Thompson, however, did not attempt to contact Wright. Tr. 11609-10.

16. Thompson adopted a strategy of attempting to show that IBT laboratory practices in 1972 were typical of laboratories in general. He said he abandoned the defense, though, because he decided he couldn't so defend IBT's practices. Tr. 11220-21. Another try at the same issue was made later. Discussing his defense of IBT, Thompson was asked whether his strategy changed. Before a defense objection was sustained, Thompson testified that originally he hoped to show that IBT laboratory problems were common among toxocological laboratories. Tr. 11571-78.

17. Thompson testified there was a meeting of the IBT Board of Directors on March 21, 1977. He had prepared a letter for transmission to the FDA stating IBT could not find the missing blood data. Tr. 11331, 11556. Drs. Calandra and Keplinger objected to the letter. *Id.*

18. During the meetings at which the TCC study was discussed, Fred Current testified, there were problems with the numbering system for animals on the study. IBT employees proposed numbering systems, but Current found them inadequate. He felt a system developed by a non-defendant and government witness, Phil Smith, was the best. Tr. 11669-72.

19. In November of 1976 Phil Smith told Current that the blood work for the Naprosyn study had not been conducted. Tr. 11676-76a.

20. In 1977 Drs. Calandra and Keplinger told Current that Thompson was to have limited access to IBT employees, to data, and to IBT's premises. Tr. 11677-79.

See par. 11 above.

21. Sometime after mid-December of 1976, Dr. Calandra told Current that Thompson should be fired because he was not accepting information which IBT management provided. Tr. 11680.